CADWALADER'S CASES

BEING DECISIONS OF

THE HON. JOHN CADWALADER

Judge of the District Court of the United States for the Eastern District of Pennsylvania, between the Years

1858 and 1879

COMPRISING SOME RULING OPINIONS ON QUESTIONS OF

PRIZE AND BELLIGERENCY

Arising During the Civil War

TOGETHER WITH DECISIONS

IN ADMIRALTY, IN EQUITY AND AT COMMON LAW

Volume II

Pace ac Bello
Inter Cives et Inter Gentes
Salva Justitia Patria Salva
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DISTRICT COURT. FEBRUARY 6, 1864.

ADMIRALTY.

THE ISLAND BELLE.

1. A cargo owned by residents in a hostile district and shipped in a vessel also owned by them is sold in a place not hostile; the proceeds remain with persons by whom a new cargo is shipped in good faith apparently on their own account, although the proceeds of the first shipment was made the basis of a credit in the port of the last shipment, of which the hostile owners have the benefit. *Held,* that such result did not invalidate the claim for the cargo. Allegations of proprietorship must be suspiciously regarded and the fullest proofs required; but when such proofs are adduced by the party on whom the burden of proof rests, there cannot be a condemnation upon the former suspicion.

2. A vessel beneficially owned by hostile persons, navigated by a hostile person who is her nominal owner, is transferred by him to their own commercial agent in a foreign country, who immediately executes powers to the same navigator enabling him, not only to conduct and manage her future employment, but to sell her. So thin a veil thrown over the trade of a hostile district does not protect a vessel from capture.

3. Ownership as definable in a court of common law is not sufficient to protect a vessel from condemnation in a prize court.

4. No change of property is recognized in a prize court where the disposition and control of a vessel continues in the former agent of her former hostile proprietors.

5. Claim should be made by alleged owners, or on their behalf, in due and legal form. Where it has not been so made, and the substantial requirements of a test oath not fulfilled, evasions without limit would ensue.

PRIZE.

CADWALADER, J.

This vessel, formerly the General Ripley, was built in 1861, at Charleston, South Carolina. She went to sea on her first voyage, without being coppered, in the latter part of October, 1861, with a cargo of rice; and, having avoided the blockading force, arrived at Nassau, New Providence, early in November. On the 12th November, 1861, she sailed, without having unladen her cargo, for St. Jago de Cuba, which she reached on

the 20th. On the 22d, she sailed, without having unladen, for Trinidad de Cuba, where, on the 28th, her cargo was discharged. She there took in a cargo of sugar and molasses, with which, on 20th December, 1861, she sailed for Baltimore, where it was intended to copper her. On the 31st December, 1861, she was captured when about twelve miles southeast of Bull's Bay. It has appeared, upon investigation, that, on this voyage, no breach of blockade was intended, but that the destination was really Baltimore. The only questions remaining have been those of ownership of captured cargo and vessel.

Her master, Thomas Phillips, had commanded her from the time when she was built. He describes himself as a British subject, having no permanent place of residence, and as having never had any interest in either vessel or cargo, otherwise than as master. He states that, at Charleston, the person with whom he transacted all business concerning the vessel, was a Mr. Canalle, a resident of that place, and that her owners were four other residents of Charleston, and this Mr. Canalle. That the ownership of the outward cargo of rice was in the same five persons appears, I think, from the manifest and other papers. The manifest shows that the rice was taken on board in five distinct shipments, marked A, B, C, D, E, corresponding with the number of part owners of the vessel. The consignees of the vessel and cargo at Nassau were Sawyer & Menendez. To these gentlemen, Mr. Canalle, who corresponded with them as if he were sole owner of the vessel and cargo, wrote from Charleston on 5th October, 1861, with directions to dispose of the cargo for his account, and afterwards, if they could dispose of the vessel, to do so, and invest the proceeds of both vessel and cargo in English bills of exchange. He wrote, in this letter, that the vessel was new, and too good to be used in running the blockade; and moreover, that when she was loaded there was difficulty in getting her in and out. He added, "The vessel is held in Captain Phillips' name. This is done to facilitate the disposal of her, and to prevent the necessity of a power of attorney." Captain Phillips deposes that, when the vessel was built, he gave to the builder, in pay-

ment for her, a check for $10,000, which was sent to him (the captain) for that purpose by Mr. Canalle. Mr. Sawyer, of the firm of Sawyer & Menendez, deposes to the arrival at Nassau of the General Ripley, owned by Captain Phillips, *in trust for sale for Mr. Canalle,* with, as deponent was informed, *verbal* instructions to Captain Phillips to sell her in case a fair price could be obtained. Mr. Sawyer further deposes that he thereupon himself purchased her, and on the 8th of November received from Captain Phillips a bill of sale, of which a certified copy is produced. In this bill of sale Captain Phillips describes himself as of *Charleston, in the State of South Carolina.* This must be deemed his commercial residence, which, in a prize court, defines his personal relation. The apparent ownership of the vessel, therefore, could not have continued in his name without liability, as the property of a hostile person, to be captured anywhere at sea by cruisers of the United States. He deposes that Mr. Sawyer paid him no money on account of the vessel, and that no consideration passed therefor to his knowledge. This is explained by depositions taken at Nassau, including those of both members of the firm of Sawyer & Menendez. From these depositions it appears that Mr. Sawyer, having funds in bank to his private credit, drew upon them, his own check of 8th November, 1861, for £2,083 6*s.* 8*d.*, the amount of the consideration expressed in the bill of sale of that date, payable to the order of Sawyer & Menendez, who had their partnership account in the same bank; and that this check was presented by Mr. Menendez, and its amount credited to their firm, and charged to Mr. Sawyer by the bank. These gentlemen depose that the price of the vessel was $10,000, equal, in British sterling money, to the above amount of £2,083 6*s.* 8*d.*, which was thus paid. Annexed to the deposition of Mr. Sawyer, who states that, at this time, he had no money whatever belonging to Mr. Canalle, is a letter from Mr. Canalle, dated Charleston, S. C., December 12, 1861, to Sawyer & Menendez, containing this passage: "Having received several of your favors, one of which contained account sales of the schooner Gen'l Ripley, also sales of the cargo of rice, have

been examined and found correct; also an account current to date, and a bill on England for the amount in full, for which please accept my thanks." No account whatever, or copy of one, and no copy of any letter to Canalle is produced. No correspondence or account between Sawyer & Menendez and the consignees at Trinidad has been produced.

The objection to Mr. Sawyer's purchase of the vessel, through a sale effected by his own firm as agents of the seller, loses part of its force when we consider the effect attributable to the presence and concurrence of Captain Phillips. There will be no necessity to consider particularly this objection to the alleged sale.

On the 11th November, 1861, at Nassau, the vessel, under the name of the Island Belle, was registered as Mr. Sawyer's. On the same day that gentleman executed two papers. One of them constituted Captain Phillips the supercargo, with unlimited authority over the employment and management of the vessel in her intended voyage to Cuba, and in her future voyage or voyages from that island to any port or ports. The other paper was a power of attorney, such as, in the late British Merchant Shipping Act, is called "a certificate of sale." The latter paper, which was to remain in force for twelve months, the longest time allowed by that act, authorized Captain Phillips to sell the vessel at any port in the United States or the West Indies, for a sum not less than £2,291 13*s.* 4*d.* These papers were unrevoked at the time of capture. Captain Phillips, as the general representative of Mr. Sawyer, is therefore peculiarly accredited by him. This gives unusual force to certain statements of Captain Phillips concerning the vessel. He appears to be an intelligent person, and a good man of business. He deposes that in October, 1861, when he was about to sail from Charleston, he *there* signed a bill of sale of the vessel, setting forth that he was the owner, and conveying her to Mr. Sawyer, and that on arriving at Nassau, he delivered the bill of sale thus executed by him, to Mr. Sawyer. If this was the same bill of sale of which a copy is annexed to the Nassau depositions, the date may have been in

blank, and that of 8th November inserted there. But it is more probable that a new bill of sale, in the usual printed form in use at Nassau, was there prepared, and was substituted for the original one. There is no contradiction between the statement of Captain Phillips and that of Mr. Sawyer. If there had been, the statement of the captain must, according to the general rule in prize cases, prevail. This rule applies here with peculiar force, inasmuch as he was not the simple navigator of the vessel, but, as has been already explained, the general representative of Mr. Sawyer in respect of her.

The cargo from Trinidad for Baltimore was shipped by two commercial houses. The shippers of one portion of it wrote to their correspondents in Baltimore: "It may be that Captain Phillips may feel disposed to come back with his vessel to our port, and to take half interest in a small cargo as per note we enclose. In that case he will pay to you half the amount of invoice, and the other half you will charge us in account." The shippers of the other portion, in a letter to their Baltimore agents, referring to a signature of Captain Phillips at foot of it, wrote as follows: "Captain Phillips, *intending to copper his vessel with you,* and for other expenses which he may be obliged to incur, we beg to open herewith, in his favor, a credit to the extent of $4,000, of which please to take note and pay to him any amount up to the stated sum, charging the same to our account." Another letter from the same parties indicates the source of this credit. Here they say: "*We have still in hand for the disposal of the captain, the total funds for the proceeds of the load of rice* brought here by Island Belle from Nassau, and sold by us; and we doubt whether the captain will be in want of the whole $4,000 at your place. In case he does, however, and in case our little lading should not be sufficient to reimburse you, we will, upon the receipt of your disbursement, of course, at once, send other ladings for the possible balance." Two open letters from Sawyer & Menendez, both dated at Nassau on the same day as the above mentioned power of attorney and certificate of sale to Captain Phillips, introduce Captain Phillips to the respective corre-

spondents of Sawyer & Menendez at Baltimore and New York. In each letter they say, Captain Phillips "visits your port, in his vessel, on business;" and recommended him to local good offices in the usual form of a commercial introduction. The expression *his* vessel is here of no distinct import. It might have been used as to the master of a vessel who had no proprietary interest in her. But the letters do not import that the business on which he was to visit those places was that of the writers, or either of them. Moreover, if Sawyer & Menendez, or either of them, had owned the vessel and cargo, the correspondence from Trinidad with Baltimore as to the funds retained at Trinidad, was, to say the least, extraordinary. On the other hand, there was nothing extraordinary in this part of the business, if Captain Phillips was navigating the vessel for her former owners in Charleston, and the funds retained as the basis of the credit on Baltimore were held in Trinidad for their account.

The parties at Trinidad who shipped the cargo for Baltimore were Spaniards. They shipped it professedly for their own account. The captain claimed it for them, and swore that it belonged to them. That they stood in very friendly relations to the owners of the vessel and of her outward cargo of rice, was apparent. But they might, if they saw fit to retain the proceeds of this rice, have done so, and have made the shipments for Baltimore on their own independent account. That these shipments were owned exclusively by these Spanish shippers was attested by every proprietary document that could have been required for the purpose of attesting it in a suspected case, including oaths for entry at the Baltimore custom-house upon the invoices on board. These oaths of ownership were made conformably to the provisions of the act of Congress of 1792. Nothing more could have been expected under an order allowing further proof. It was nevertheless contended, with some apparent force, on the part of the United States, that, as the consignment of rice to Trinidad had been the means of transmitting $4,000 of its proceeds to Baltimore to be employed by the master as agent of its owners in coppering the

vessel, etc., for their account, the contrivance of shipping the cargo for Baltimore as the property of the Spanish agents who effected this arrangement was obviously collusive, and, in its ultimate effect, if no capture had occurred, would have increased the capital invested for hostile account. The argument was, that if such an arrangement covered from capture property which otherwise would never have been shipped, the consequence would be that any hostile person might, in time of war, send his funds to foreigners, who, retaining them in hand as bankers of the remitter, might, for their own ostensible account, thus make shipments of which the ultimate avails would either directly or indirectly accrue to his benefit, while the investments would, in the meantime, traverse the ocean exempt from capture. The answer to the argument was, that the possibility of such evils could not be guarded against in prize courts, and that the only question in such cases was that of proprietorship. The true doctrine is that allegations of such proprietorship must be suspiciously regarded, and the fullest proofs of it required. But when such proofs are adduced by the party on whom the burden of proof rests, there cannot be condemnation upon the former suspicion. The cargo in this case was restored by my decree, without any award of costs or damages against the captors. This decree was, on appeal, affirmed.

The remaining question is whether the vessel should be liberated or condemned. The decision as to the cargo has been explained, because the argument showed that it had not been rightly understood. The judgment was upon the ground that, assuming the ownership of the vessel and of the rice and its proceeds to be hostile, this cargo was not, in fact, an investment of the proceeds of the rice, but was a shipment for the independent account of the Spanish parties for whom the captain claimed it.

He never interposed any claim for the vessel. Recurring to his peculiar relations to her which have been twice mentioned, this omission is not to be disregarded. It seems, indeed, to admit of but one explanation. The case has been argued

as upon a *claim* by Mr. Sawyer. That gentleman has been represented by those able to give him the best legal advice. He has filed his own and certain other affidavits, all of which, with all the documents offered on his part, have been read as if taken under an order allowing further proof. These affidavits were taken in April, and filed here in November, 1862. They were allowed to be filed, subject to all legal exceptions. If the substantial requirements of a test oath had been fulfilled, I would not regard the informality of the absence of a claim. But no claim, properly speaking, has been presented. If it had been, the affidavit of Mr. Sawyer would not have served the purposes of a test oath. It does not state, as is usual in such cases, that no person was interested in the vessel at the time of capture, or at any time after the commencement of the voyage in which it occurred, and that if restored, she would belong to himself exclusively. He merely deposes that he bought her from the captain, and paid for her with his own money, by his check, as above; that he received the bill of sale, and had her registered in his name under the provisions of the British Merchant Shipping Act; that she remains *registered as his property,* and that no person whomsoever in the Southern States of America owns any part, share, or interest in her. If such non-fulfilment of the requirements of the test oath were sanctioned, evasions without limit would ensue. Some of the deficiencies of the case, in the absence of such other documents as would have been expected under an order allowing further proof, have been indicated.

Assuming the truth to be that, as between Mr. Sawyer and the former owners, their proprietorship was divested irrevocably, and that he was, at the time of capture, the absolute owner of the vessel, as ownership is definable in a court of mon law, she would, nevertheless, be liable, in a prize court, ondemnation. The rule of decision in some countries has that, as to a vessel, no change of ownership during hoses can be regarded in a prize court. In the United States, England, the strictness of this rule is not observed. But hange of property is recognized where the disposition and

control of a vessel continues in the former agent of her former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile. That such were the relations of Captain Phillips is apparent. Maritime hostilities could not be prosecuted with any effect if this rule did not apply in an extreme case like this. A vessel, beneficially owned by hostile persons, navigated by a hostile person who is her nominal owner, is transferred by him to their own commercial agent in a foreign country, who immediately executes powers to the same navigator, enabling him not only to conduct and manage her future employment, but to sell her. If, therefore, the case were, as Mr. Sawyer, or, as his advocate states it, she should, I think, be condemned. I am not aware that there was ever so thin a veil thrown over trade of a hostile district to protect a vessel from capture.

But can this be deemed the true state of the facts? If Captain Phillips tells the truth, as I must believe that he does, the transaction was not a sale and purchase of the vessel, but a paper transfer of her at Charleston, so far executed there that the legal title was to vest, at all events, in Mr. Sawyer, as a British subject. The captain, though for some purposes, himself a British subject, was a person whose residence would have made her liable to capture if he had continued the nominal owner. In the voyage from Charleston, as she was to run the blockade, this was unimportant. The captain had no interest of his own in her. He was to obey his instructions received at Charleston. Their effect was to make it obligatory on him to divest himself at Nassau of all appearance of ownership. His having been required to execute the bill of sale at Charleston proves this. If so, the agency of Sawyer & Menendez to *sell* her was a fiction. The general tendency of the other evidence is to the same result.

I would enter a decree of condemnation at once if there had, in any prior stage of the cause, been a formal order allowing further proof. But, as no such order has been made, I will make it now, allowing forty-two days. This will put the case in a proper shape for an appeal, and will give to Mr.

Sawyer an opportunity to diminish, as far as may be in his power, the difficulties which he may have occasion to meet in the superior tribunal. It is not probable that my own opinion of the case will be changed by any further proof that may be adduced.

AN APPEAL was taken in this case, but appears to have been dismissed for non-compliance with final order, whereupon the prize money was paid into the treasury.

OPINION AND ORDER.

CLAIM by consignees in form of communication to the judge. Made at a previous stage of this cause.

Thomas Phillips, master of the said schooner, comes into court and delivers to the judge a document of the following effect:

Baltimore, January 24, 1862.

The undersigned consignees by the British schooner Island Belle, Captain Thos. Phillips, beg leave to represent to your Honor that the said vessel was to the best of their knowledge and belief engaged on a legal voyage when seized by the United States steamer Augusta.

The cargo, consisting exclusively of sugar and molasses, was shipped by our correspondents at Trinidad de Cuba, as will appear from the invoices and bills of lading contained in the letters given in charge of the captain and now in possession of the United States authorities, which we request to be opened and examined. We are also ready to furnish duplicates of said papers, and to lay before your Honor all other letters from the shippers of the cargo addressed to us in reference to the business. As a further proof of the schooner's only and original destination having been Baltimore, we would state that the cargo has been insured by us under instructions from our correspondents at Trinidad de Cuba.

The undersigned hope that this representation will have your Honor's early consideration and that orders will be given without delay for the releasing of the property of

their friends, so that further damage to their interest may be avoided.

In this expectation we subscribe ourselves very respectfully your obedient servants,

A. SCHUMACHER & Co.,
LAMBERT GIDDINGS & Co.

Enclosing documents purporting to be of the dates and character following respectively, viz.:

1861, Dec. 18. Bill Lading.
Same date. Letter press duplicate in German language.
1862, Jany. 24. Certificate of Insurance Co. as to Insurance.
1861, Dec. 18. Letter press duplicate.
1862, Jany. 24. Certificate of Wm. Spicer.
(See files.)

WHEREUPON the COURT said, the said Thomas Phillips being present:

I cannot receive these papers as a claim with exhibits amended, nor can I recognize the parties from whom they purport to have come as having a standing in court. There is no test oath or compliance with requisites of which the deficiency will be observed by such proctors as these gentlemen respectively may hereafter retain, but as they are the respective consignees to whom the cargo, according to the purport of certain documents on board, would have been deliverable, their omissions may for aught that appears be readily supplied. The papers may therefore be filed, and the District-Attorney and other officers of the court will recognize these gentlemen as entitled respectively from time to time to such notice, if any, as would be properly given to admitted claimants of any proceedings in the cause. The notice, until a proctor shall have appeared, to be transmitted by mail and proved by affidavit of the person mailing the same.

I take this occasion to remark that the case is one in which

the cargo and the vessel may possibly be complicated with each other, and that no claim has been as yet made for the vessel, although according to her documented ownership, etc., the owner is a person of whom the captain might under ordinary circumstances be considered an authorized representative.

I perceive no reason that the case should not, as to both vessel and cargo, be promptly heard if proper claim should be filed.

The clerk of the court will transmit a copy of this entry, together with a copy of the report of the surveyors to the respective parties in Baltimore, who will, however, understand that no further communications of an epistolary or otherwise informal character will be received.

CIRCUIT COURT. MAY 21, 1864.

EQUITY.

JAMES *v.* BLAUVELT & FREDERICKS.

A seller of unimproved land, in order to obtain an expected profit of nearly twice its value, conveyed it in fee, with a stipulation that he would, by certain instalments, advance more than four times its value towards the cost of stipulated improvements; and received, when he conveyed it, mortgages of it securing a sum composed of its value as unimproved, the stipulated amounts of his advances, and the amount of his intended profit. This was done under an arrangement that the purchaser should not become a debtor for any of these amounts. The seller, therefore, made the conveyance to an irresponsible middleman, who executed the mortgages and the bonds which they secured, and the stipulation to improve the land; and thereupon conveyed it, while still unimproved, for a nominal consideration, to the party who had, from the first been the intended purchaser, describing it as subject to the mortgages. The stipulated improvements having been completed, the value of the land, as enhanced by them, exceeded greatly the whole amount secured by the mortgages. *Held,*

1. That a double stamp duty was not incurred by the duplication of the original conveyance.

2. The conveyance from the middleman required no stamp, the consideration or value not exceeding $100.

3. The conveyance to him should have been stamped under an assessment of the duty, not upon any prospective enhancement of the value of the land by the stipulated improvements, nor upon the value of it as unimproved at the date of the conveyance, nor upon the expected profit, but upon the

consideration **estimated as the whole amount of the return secured by the mortgages to the seller, not deducting his advances.**

BILL IN EQUITY for the specific performance of contract for the purchase of land.

STATEMENT of case:

In the act of 1st July, 1862, chapter 119, the clause imposing stamp duties upon conveyances makes the duties assessable in respect of the *consideration* or *value*. No stamp is required unless the consideration or value exceeds $100. (12 Ll. U. S. 481, 482.)

Tatlow Jackson, on 13th April, 1863, received a conveyance of unimproved land in Philadelphia, which was afterwards divided into 240 building lots. The whole consideration of the conveyance to him was reserved in ground rents extinguishable on the payment of amounts, in the aggregate, $65,000. On 11th May, 1863, Jackson conveyed the whole of the land to the respondent, Fredericks, in fee, by a deed containing a covenant of Jackson to discharge all accruing ground rent, and extinguish the ground rents on or before 1st July, 1864. Fredericks executed 240 bonds of the same date with the conveyance to him, each bond conditioned for the payment by him to Jackson of $2,000, at a certain time, with interest half yearly; and, on the same day, executed 240 mortgage deeds, each conveying one of the lots to Jackson in mortgage to secure one of the bonds. By an agreement between these parties, of the same date, Fredericks engaged to build, within a limited period, upon each lot, a house of a certain value greater than the mortgage debt charged upon it; and Jackson engaged to advance to Fredericks, towards the cost of each building, $1,200, in the whole $288,000, payable by instalments at certain stages of the progress of its construction. The extinguishment money, $65,000, which Mr. Jackson was to pay, was the whole value of the unimproved land. On his pecuniary advances, $288,000, his premium, secured by the mortgages, was to be $127,000. The three amounts, together $480,000, were the gross aggregate of the mortgage debts.

By a deed of 13th May, 1863, Fredericks, who was an irresponsible person, conveyed to the complainant in fee, for the nominal consideration of one dollar, the 240 lots, described as each subject to a mortgage for $2,000. A house having been built upon one of them, and the ground rent upon it extinguished, the respondent, Blauvelt, on 1st March, 1864, by a written agreement, purchased it for $4,500, from the complainant, who now sues to compel a specific execution of this agreement. Mr. Blauvelt makes no other objections to completing his purchase than that the conveyances from Jackson to Fredericks, and from Fredericks to the complainant, were not duly stamped.

According to the phraseology of the writings, $800, which was the excess of each mortgage debt above the stipulated amount of Mr. Jackson's advances towards the cost of each building, was the consideration receivable by him for the conveyance of each lot. This, on the 240 lots, was $192,000. The stamp duty, under the act of Congress, if assessable in respect of a consideration of this amount, would have been $380. Stamps to this value of $380 were affixed to the conveyance from Jackson to Fredericks. On the conveyance from Fredericks to the complainant there was no stamp. The complainant insisted that this deed required none, and that the former deed was duly, if not too highly, stamped; but submitted the questions to the court's decision, offering to put such stamps, if any, upon both deeds, or upon either of them, as might be requirable, in order to make the title unobjectionable.

The court directed that notice of the pendency of the suit should be given to the Attorney of the United States for this District. He was present at the hearing.

The case was argued before Judge CADWALADER, holding the Circuit Court.

Mr. Price, for the complainant.

Mr. Drayton, for the respondent, Blauvelt.

Present, *Mr. Gilpin,* the Attorney for the United States.

CADWALADER, J.

Formerly, in the case of an agreement between the owner of an unimproved suburban lot of ground and an intended purchaser, that the latter party should, within a limited time, build upon the lot a house of a certain value, and that the seller should, by instalments, at certain stages of its construction, advance, towards its cost, a part of its intended value, the course of business in this neighborhood was to postpone executing the conveyance until the house was duly finished. The gross amount receivable by the seller, including his pecuniary advances, with interest, was often secured at the same time, by a mortgage to him of the house and lot conveyed. In order to avoid inconveniences from statutory liens for work and materials, another method of carrying the purposes of the parties into effect has been substituted. The conveyance of the lot is now made before the building is begun. The mortgage to secure the gross returns is executed at the same time. A contemporaneous agreement, containing the mutual executory engagements, operates as a deed leading or declaring those intents and uses of the conveyance and mortgage which do not appear on their face. The purposes to be carried into effect are, under this modern method of conveyancing, precisely the same as they were under the former method.

Under these arrangements, the hazard that the purchasers would prove to have been parties of slender means and imperfect integrity, was, of course, proportional to the premiums receivable by the sellers on their pecuniary advances towards the cost of the buildings. The failure of such speculations was notoriously frequent. This made the better class of builders unwilling to engage in them without an exemption from personal responsibility for the mortgage debts. A third method of conveyancing, which is not unobjectionable, was therefore adopted in some such cases. According to this method, the unimproved lot is conveyed, in the first instance, to an irresponsible middleman, such as the defendant, Fredericks. He executes the bond and mortgage, and sometimes also, as was

done here, executes, as a party, the agreement which ascertains the practical uses and purposes of the conveyance and mortgage, ostensibly as if it were intended that he should retain the proprietorship and build the house. This done, he conveys the unimproved lot, subject to the mortgage, for a nominal consideration, to the party who has, from the first, like the complainant in this case, been the intended purchaser. With reference to certain judicial decisions in Pennsylvania, great caution is required in so penning the deed which conveys the lot as to exclude the implication of an engagement on the part of such actual purchaser to discharge the mortgage debt.

One of the questions in this case was whether a double stamp duty had been incurred through this duplication of what was in effect a single conveyance. The parties to such a fiction could not reasonably have complained if this had been the legal consequence. If an action at the suit of the United States had been brought in order to test the question, I would probably have directed the case to stand over until the determination of such collateral suit. But none has been brought; and, upon reflection, I think that the double duty would not be recoverable.

The conveyance from Fredericks to the complainant, separately considered, required no stamp. If, with reference to the entire transaction, the full amount of stamp duty was not paid, the whole deficiency should be assessed upon the conveyance from Jackson to Fredericks. As to this deed, the decision should be the same as it would have been if the conveyance had been a direct one from Jackson to the complainant, without the interposition of Fredericks.

If every house and lot of the two hundred and forty had been worth as much as the price for which the defendant, Blauvelt, has purchased one of them, the whole value, when all the houses were finished, would have been $1,080,000. There is no necessity to inquire precisely what may be the whole actual value of all of them, as it is thus enhanced by the improvements. If the execution of the conveyance had, according to the former course of business been postponed until after the houses were built, a question whether the stamp duty should have been

assessed upon such enhanced value, or upon the consideration of the conveyance, might, perhaps, have arisen. But such a question cannot arise under the modern method, which has been adopted in this case, of conveying the lots while unimproved. A prospective, as distinguished from an existing value of the subject of a conveyance cannot be regarded in making the assessment under the act of Congress. This remark applies, without exception, to conveyances of land of which the value is, under existing stipulations, to be enhanced by future buildings or other improvements, however unqualified the stipulations may be.

But such prospective enhancement of the value of the subject of a conveyance must not be confounded with an excess of its consideration beyond the present value of the subject. In this case, the value of the unimproved lots, when conveyed, was only $65,000. But the consideration, by whatever standard measurable, was of much greater amount. According to the import of the act of Congress, the assessment of the stamp duty is to be made in respect of the *consideration* or *value*. When the present value of the subject is *less* than the conventional or actual amount of the consideration, the stamp duty must be assessable on the *consideration,* without any reference to value. Parties may be so bound conventionally by their own language in a conveyance, that when the consideration expressed in it is *greater* than the actual consideration, and *greater* than any value of the subject, the stamp duty will, under this act, be assessable as if the actual consideration were that expressed. No such case is here in question. The dispute is whether the amount of the consideration, as conventionally estimated by the parties, was not *less* than the actual amount. If thus less, the duty should have been assessed on the *actual* consideration, without reference to the language of the writings. The facts are undisputed. The only question is by what standard the actual consideration should have been measured. The proper measure was the same as it would have been if the conveyance had been postponed until after the houses were finished. In a case of such

postponement, the consideration would not be enhanced, because the enhancement of the value of the subject, when conveyed, would be actual instead of prospective. Nor was the consideration of the conveyance, which in fact was made before the lots were improved, less in amount because the stipulated enhancement of their value was, at its date, prospective only.

The conveyance which simply executes a contract of sale or exchange, is a mere transfer of property. The consideration of other contracts, executory or executed, may be merely that which induces the consent of a party. But the consideration of sales or exchanges includes whatever else may be receivable in return for their subjects. Here consideration must not be confounded with profit. A consideration of great value may be receivable without the receipt of any profit. When, as in the present case, a seller is to get a profit, the *beneficial* return is compounded of the cost of the subject and of the profit. There may, however, be a gross return to him, which includes an addition to such beneficial return. This addition, though not profitable, but the reverse, may, nevertheless, be part of the consideration. Mr. Jackson, that he might get a profit of $127,000, conveyed these lots when worth $65,000, with a stipulation that he would advance $288,000 towards the cost of the stipulated improvements, and received, at the same time, the mortgage security for a return of the three amounts, together, $480,000. The *beneficial* return to him, composed of the first and second amounts only, was $192,000. The *gross* return was the whole $489,000. The question is whether stamp duty is assessable on the beneficial, or on the gross return.

If the word *value* in the act of Congress could be understood as meaning *value of the consideration,* the assessment might properly be made upon the beneficial return alone. But the words *consideration* or *value*, as used in the act, have no such import. Their application cannot be such that the word *value* qualifies the word *consideration.* The *consideration* is to be understood as that of the *conveyance*, the *value* as that of the *subject* of conveyance. The question depends, there-

fore, upon the unqualified import of the phrase, *consideration of a conveyance.*

When moneys advanced or to be advanced by a seller towards the cost of improving the subject of sale, are a part of the gross return, it might, at first view, seem reasonable to deduct them, as was done by the parties in this case, and estimate the consideration as the difference. But the consideration is not thus measured in conveyancing. In the language of conveyancing the gross return is understood as the consideration. The question, without being changed in substance, may be simplified in form, by supposing that the execution of this conveyance had been postponed until after the houses were finished and the ground rent was extinguished, the advances having, in the meantime, been made by Mr. Jackson, and that he had received, at the date of the conveyance, a single mortgage securing the whole $480,000. In the ordinary phraseology of such a mortgage, the land mortgaged would be described as the same which had, by deed of the same date, been conveyed to the party mortgaging it for the *consideration* which the mortgage secured. Such phraseology is not without legal importance. In most, if not in all, of the States of this country, there are, as in England, known distinctions between a mortgage for the consideration of a conveyance and other mortgages. Under the recording acts of Pennsylvania, mortgages of land generally have priority only from the time of recording them; but a mortgage for the purchase money of the land mortgaged, if recorded at any time within sixty days from its execution, retains its priority against other mortgages recorded in the meantime. In this and in other respects, the mortgages to Mr. Jackson were for the purchase money of the land, or, in preciser language, for the consideration of the conveyance. They were so to their whole amount of $480,000. As to the $288,000 advanced by him, their incidents at law, and in equity, were not, in any respect, less those of mortgages for the *consideration* than as to the $65,000 which extinguished the ground rents, or as to the premium of $127,000 which was to be his profit.

The consideration of his conveyance was, therefore, not less than $480,000. The stamp duty which should have been paid was $940. Of this, $380 has been paid. The complainant, by affixing stamps of the additional value of $560 may make his title unexceptionable. When they shall have been affixed, a specific execution of the purchase will be decreed if the complainant, acquiescing in this opinion, shall ask such a decree.

I had great doubt, at first, upon the question of the amount of consideration. The doubt no longer exists. But I regret that the Circuit Judge was not present at the argument. After the intimation of my opinion that the $560 is due, an action to recover it will, doubtless, be brought at the suit of the United States, if it should remain unpaid. If the complainant prefers that the question should be decided in such an action, and the trial of it can be expedited, the present cause may stand over to await the result. If the trial of such an action cannot be sufficiently expedited, and the complainant's counsel wishes this case argued before both judges, it may stand over for a re-argument.

The complainant acquiesced in the foregoing opinion, and affixed additional stamps of the value of $560 to the deed; whereupon, a specific execution of the purchase was decreed; and it was ordered that he should pay all costs.

DISTRICT COURT. JULY 1, 1864.

ADMIRALTY.

THE SEA CREST.

A contract for lighterage contained the words "and while waiting for pumps is to look after and care for the ship and by saving the cargo and materials," etc. *Held,* that the charge for the services rendered thereunder, although partial and to the ship only, and with no possibility of effective service to the cargo, was a case of general average.

LIBELS for salvage.

CADWALADER, J.

The controversy or controversies in this case would be simplified and possibly would cease altogether if a *pro forma* statement of a competent dispacheur discriminating between the charges which fall under the respective heads of general and particular average could be exhibited, and if the credit usually attributed to such a statement could be given to it by consent of parties. But I understand that practical impediments prevent such a statement from being as yet prepared.

The counsel representing one of the principal interests has requested of the Court the expression of an opinion whether a contested charge for lighterage would if allowed fall under the head of general or particular average.

The contestation as to this item would probably cease if it were decided that the proper head is general average. But the dispute might remain open if the charge were not of this character. The lighters were engaged at a time when it could not have been reasonably expected that they would in their intended service save anything except parts of the wreck of the vessel; they did not in fact save anything except parts of the wrecked vessel. The question is whether such a charge if allowed would be a particular charge against the vessel or a general charge to be averaged upon vessel and cargo as common contributory interests. The form of the written contract of 24th March, 1864, is decisive on this point so far as the lighters were engaged under it. The words, "and while waiting for pumps is to look after and care for the ship and by saving her cargo and materials," etc., made it the duty of the lighterman to render any service that might have been possible as to the cargo.

That there was no probability of any such effective service as to the cargo becoming possible on the intended trip, is, I think, unimportant.

All subjects of a general maritime adventure should be considered a unit so far as efforts of this character may be made for any purpose of salvage. The principle from which

the rule applied in the case of Bevan *v.* The Bark United States (4 Watts), was deduced, applies here with peculiar force.

I think, therefore, that the charge in question, if allowed, falls properly under the head of general average.

CIRCUIT COURT. NOVEMBER 9, 1864.

EQUITY.

THE PHILADELPHIA & READING RAILROAD COMPANY *v.* CHARLES MORRISON AND OTHERS.

1. The act of Congress of 25th February, 1862, known as the legal tender act, is not constitutional in so far as it compels the receipt of the notes, the issue of which it authorizes, in payment of debts in private transactions.

2. Such notes are not money. They represent money only as they circulate upon the credit which may be given to the national faith pledged for their payment.

3. The law authorizing their issue is not an appropriate means of executing any constitutional power other than that of borrowing on the national credit.

4. The constitutional power so to borrow should be classed among those which concern fiscal subjects. Relations of the subject may afterwards become commercial. The Constitution has conferred upon Congress no general power to regulate commerce; but even if such power had been conferred, the authority would not have included such a power as incidental.

5. There can be no implication of a constitutional power enabling the United States to make their bills of credit a tender in payment of debts from the constitutional power of the States to do so. No argument can be invoked from the tenth amendment that the constitutional powers of the national government should be deemed co-extensive with all the powers of which the Constitution prohibits the exercise by the several States.

6. To assume a power as incidental to another power which is itself incidental, goes beyond the just limits of constructive enlargement, even if the omission of an express grant of power, and the effect to be given to a prohibition of the subject, be disregarded.

7. The extinguishment money of a ground rent is not a debt within the meaning of the statute. *Ib.*

8. But the ground rent being an estate in the land according to the law of Pennsylvania it cannot be extinguished by a tender of the notes authorized by the statute.

STATEMENT OF THE CASE.

THIS was a bill in equity to compel the defendant to extinguish ground rents on receipt of the extinguishment moneys in United States notes. The constitutionality of the legal tender law and its applicability to this case were the points raised.

As to the second point, Judge Cadwalader, for the reasons given in his opinion, withdrew from the bench. It was decided by Judge Grier adversely to the complainants on the ground that the extinguishment money of a ground rent in Pennsylvania is not a debt within the meaning of the act of Congress.

It was not necessary, therefore, to decide the first point, and the opinion here given has value only as a contribution to the learning existing upon a very grave and greatly vexed constitutional question. It will be seen that the reasoning applies to all contracts whether made before or after the passage of the legal tender acts. It will not be necessary to remind the reader of the subsequent opinion of Chief Justice Chase in the case of Hepburn *v.* Griswold, 8 Wall. 603, in which debts existing before and after the passage of the act were discriminated; to the decision in Knox *v.* Lee and Parker *v.* Davis, 12 Wall. 457, in which that distinction is overruled, or to the broad doctrine of what appears to be the final interpretation in Guilliard *v.* Greenman, 110 U. S. 421.

CADWALADER, J.

The act of Congress of 25th February, 1862, authorizing an issue, on the credit of the United States, of notes to a certain amount payable to bearer at the Treasury, enacts that they shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except as is therein provided. The first question is whether Congress can constitutionally compel the receipt of such paper as money in private transactions. The second question is whether the enactment, if constitutional, applies to such extinguishment money of a ground rent as is the subject of this proceeding.

On the second point I do not intend to express an opinion. I own some ground rents; and although not, therefore, disqualified from sitting in the cause, may, perhaps, on this point, be less disinterested than the Circuit Judge.

We seem to differ at present in opinion upon the first point, though there has not, as yet, been a full interchange of our views upon it. The organization of the Court enables either Judge sitting alone to adjudicate a case. I will, therefore, in order to enable the Circuit Judge to decide this case on the second point, withdraw from the bench. Before doing so, however, as he has made some remarks upon the first point, I will state my opinion upon it with my reasons.

The money in a country is composed of its own coins and of those imported coins of which its laws permit the circulation, either at their actual value or at a prescribed exchangeable value. A nation's coins are portable metallic substances in pieces whose composition, weight, impression and exchangeable value are ascertained by law. The purpose of their coinage is to impart a standard value to them. Through this they constitute money, properly so called. They have an actual value which, as tested by foreign exchanges, approximates their prescribed value, or differs from it, according to their pureness or alloy. Motives of national policy, and considerations of national self-respect tend to check, if they do not altogether prevent, such abuses of sovereign power as would regulate the latter value arbitrarily.

The notes in question may be designated as *bills of credit* of the United States. They might, for some purposes, perhaps, be called *paper money* of the national government. But they represent money only as they circulate upon the credit which may be given to the national faith pledged for their payment. Paper money, so called, has, in itself, no value measurable with reference to any standard of material or weight. The unqualified use of the phrase paper money, therefore, never can be accurate. It is, in its occasional use, which results, perhaps, from the infirmity of language, applied, in a restricted sense, to those negotiable public or private

securities, which, as representatives of money, pass by delivery from hand to hand. But negotiable securities for money, though national faith is pledged for its payment, are not, in the language of constitutional law or of general public law, in the language of the jurisprudence of continental Europe or of the common law of England, or in the language of commerce, actual money. It is true that negotiable paper securities, public or private, which circulate, whether at a discount or not, resemble money in respect of their circulation. The resemblance, in this respect, is in proportion to the facility of their exchangeableness, and in the inverse proportion of any discount at which they may pass. But such resemblance ought not to be considered as independent of the available resources for their payment in coin or its equivalent. The resemblance, though they should even be readily exchangeable at their full nominal value in money, cannot make them specifically money. They have not, like the coins, a corporeal value independent of that which is inscribed on them. The similarity, therefore, does not justify their designation as money. Counsel, in arguing that paper securities may be money, have cited remarks of Lord Mansfield and some other judges, who, in administering the common law on commercial principles, have had occasion to decide questions upon transfers of title in bank notes by delivery. The same principles have, as rules of decision, been applied in like manner to questions upon the transfer of exchequer bills or Treasury notes and other negotiable public securities, and also to bills of exchange and promissory notes of private associations and of individuals. Such paper may sometimes for purposes relative to transfers of title to it, and perhaps for some other qualified purposes, be called money. Lord Mansfield, with such a relation of his words, did say that bank notes are as much money as the current coin used in common payments. But he had, in the context, said that they are treated *as* money, *as* cash, in the ordinary course and transaction of business, by the general sense of mankind which gives then the *credit and currency* of money to all intents and purposes. He did not consider them

as money to any other intents or purposes than those of credit and currency which he thus mentioned. For all purposes of this kind they may have their exchangeable value. But it cannot be an intrinsic material, exchangeable value like that of actual money. Therefore, when stricter legal precision of language was afterwards thought necessary, the notes, bills or drafts which were the subjects of such decisions were judicially called "representatives of money" (4 B. & A. 6, 9). This was a more accurate form of expression. If, in deciding a case like the present, incidental remarks of English judges in discussing such ordinary questions of civil jurisprudence, must be thus considered, the adoption by Coke and Blackstone of the maxim *nullum simile est idem* should perhaps not be forgotten. The use of the phrase *paper money* can, however, derive no proper sanction from English authorities. An action for money had and received cannot be maintained in England, by an owner of bank notes to recover their value from a wrongful holder of them "unless money has been received for them," or they have been treated, between the parties, "as money." On the same question, whether bank notes are dealt with as money, the familiar case of a tender in them depends. If they are objected to, it is a bad tender, though otherwise it is a sufficient one. The British statute of 29th August, 1833, renewing the incorporation of the Bank of England, made its notes a legal tender *so long as it should continue to pay them on demand in legal coin*, but not even thus a legal tender by the bank itself or any of its branches.

The qualification thus implied in the use of the phrase paper money is more important as to national than as to private negotiable securities. For default as to the latter there may be judicial redress. But if the former should not be paid from the treasury, the nation or its government cannot be sued. This difference was judicially considered in ascertaining the extent of the constitutional prohibition of the issue of bills of credit by the States. The result of the decisions is that the prohibition applies only to negotiable paper so issued upon the credit of a State that there is no other debtor. The notes

of a bank incorporated by a State, with no other stockholder than the State, and no capital stock except the proceeds of sale of bonds of the State, and managed wholly by directors elected by the legislature of the State, are not within the prohibition, because the bank may be sued, and its property taken in execution under a judgment. In one of the cases a credit of the State was pledged for the ultimate redemption of the notes of such a bank, and the State could, under a law in force, be sued. But these distinctions were disregarded, because the promise to pay the notes was primarily that of the bank, and because the law authorizing suits against the State might be repealed at pleasure, and, moreover, if a judgment could be obtained, payment of it was not enforceable by execution against the State. The Supreme Court thought the notes of this bank altogether different from bills of credit; saying, "A bill of credit emanates from the sovereignty of the State. It rests for its currency on the faith of the State pledged by a public law. The State cannot be sued ordinarily on such a bill, nor payment exacted against its will. There is no fund or property which the holder of the bill can reach by judicial process." (13 How. 17; see 11 Peters, 313, 314; 10 How. 205; 15 How. 317, 318.)

The qualified partial resemblance of the notes in question to money would be increased to the utmost extent possible by an effective law compelling the receipt of them as money for all purposes whatsoever. But such a law, if it could be constitutionally enacted would not make them actual money. The bills of credit emitted by the United States during the war of independence, declared the bearer entitled to receive Spanish milled dollars, or their value in gold or silver. The Congress declared that whoever should refuse to receive the bills in exchange for any property as gold and silver should be deemed an enemy, and that the paper ought to be a tender in payment of all private and public debts. The Congress, though it did not claim the power to enforce these declarations, recommended the enactment of tender laws by the States for the purpose; and in the early part of the war, this recommendation was carried

into effect by the States as far as its purposes could be effectuated by legislation. The articles of confederation usually designated as of the year 1778 were written in 1777. They contained a provision pledging the faith of the United States for the payment of the bills of credit. These articles did not go into operation till the year 1781. The bills of credit were, in the meantime, so depreciated that, as Judge Story says, "in the course of the year 1780 they" had "quietly died in the hands of their possessors." The States had, in March, 1780, been required to bring in the bills of credit at forty dollars for one silver dollar; and Congress had, "in the most pressing manner," recommended to the State legislatures the repeal of "all laws making the paper bills of the United States a legal tender, equal to gold and silver." (See Resolutions of Congress; Story Const., Book 3, ch. 33; Preamble Act of Pennsylvania, 21 June, 1781.) The present Constitution provided that all debts contracted and engagements entered into before its adoption should be as valid against the United States under it as under the Confederation. The paper money to the amount of between seventy-eight and eighty millions of dollars was supposed to be outstanding at the adoption of the Constitution; but two millions of dollars only was the estimated amount requirable in order to cover this liability of the United States. An act of the first Congress under the Constitution, for the liquidation of the public debt by certificates of a new loan, according to the specie value, provided for such liquidation of these bills of credit at the rate of one hundred dollars for one dollar in specie. (Act of 4 August, 1790, § 3.) Thus, said Judge Story, was a paper currency which had been declared "equal to gold and silver, suffered to perish in the hands of persons compelled to take it; and the very enormity of the wrong made the ground of the abandonment of every attempt to redress it." He added that "some apology, if not some justification," might "be found in the eventful transactions and sufferings of those times," but that "the history of paper money, without any adequate funds pledged to redeem it, and resting merely upon the pledge of the national faith,

has been, in all ages, and in all nations, the same;" and that "it has constantly become more and more depreciated; and, in some instances, has ceased, from this cause, to have any circulation whatsoever, whether issued by the irresistible edict of a despot, or by the more alluring order of a republican congress." The qualification implied in such uses of the phrase "paper money" requires no further explanation.

A law compelling the receipt of national bills of credit as money in payment of debts, would not give to them the greatest possible resemblance to money, because there are other uses of money. This case has, however, been argued as if the first point was whether the receipt of the notes in question in payment of debts can be compelled, or, in more constitutional phraseology, whether Congress can make them a legal tender for this purpose. I will, therefore, consider the question whether Congress has the constitutional power to make such paper a legal tender in payment of debts. A negative answer must, of course, exclude all implication of the more extended power.

The Constitution confers upon Congress power to borrow money on the credit of the United States, to coin money, regulate its value and that of foreign coin, and fix the standard of weights and measures; and prohibits the States from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts. Of the powers thus taken away from the States, the only one expressly conferred upon the national government is that of coining money. There is no direct grant of any power to make bills of credit of the United States a tender in payment of debts; and the omission must have been intentional.

But the Constitution expressly authorizes Congress to make all laws necessary and proper for carrying into execution the legislative and other powers of government which are granted. The decision of the present question depends upon the extent and application of this incidental power of legislation. In ascertaining its extent, the language conferring it has been judicially contrasted with that of a prohibitory constitutional

provision, which is not here important otherwise than as it contains the phrase "absolutely necessary for executing" certain laws of the States. From this use of the word "absolutely" in the latter clause of the Constitution, and the omission of such qualification of the word "necessary," in the clause conferring the former incidental power of legislation, the conclusion deduced has been that this incidental power enables Congress to enact not only laws absolutely necessary, but likewise any laws, not inappropriate, which may be relatively necessary, as means of executing the powers directly granted. But this does not authorize an assumption, through such legislation, of any distinct and independent power,—or of any specific incidental power which, had the intention to grant it existed, would have been expressly mentioned.

In determining the application of the incidental power of legislation, the ninth and tenth amendments of the Constitution must be considered. The ninth provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people; the tenth provides that the powers not delegated by the Constitution, to the United States, nor prohibited by it to the States, are reserved to the States respectively or to the people. These two amendments, whether their words are to be understood as restrictive or declaratory, preclude everything like attribution of implied residuary powers of sovereignty, or ulterior inherent rights of nationality, to the Government of the United States. Therefore the Constitution confers no legislative powers except those directly granted, and those which may be appropriate as incidental means of executing them.

As a means of executing the constitutional power to borrow money on the credit of the United States, a security declaring the national faith pledged for the amount of money, or credit, received is, however, proper, and is, relatively speaking, necessary. Congress may regulate the form of the securities. They may be negotiable notes of the United States; and such notes may be called bills of credit. That they are so called, that the Constitution does not expressly authorize their emis-

sion by that name, and that it prohibits the emission of such paper in any form by a State, cannot preclude their issue by the United States for this purpose of pledging the national faith. The notes in question are, therefore, lawfully issued, and may lawfully circulate. Congress can, of course, regulate the exchangeable value of such paper in transactions of many kinds of, with, or under, the national government itself; and may make it receivable as money in such transactions. The notes may be thus accredited so as to circulate, with no compulsion, as money, in ordinary times at no discount, in transactions of private business. But in times of national trouble, and consequent fiscal embarrassment, this cannot be, with reason, expected. The treasury notes issued by the United States under Congressional authorization did not, in the years 1814 and 1815, circulate except at discounts which were variable and sometimes great. The country was then at war. There was a hostile blockade of the sea coast with occasional invasions on land. The banks of the States were insolvent, that is to say, had suspended payments in coin. But they refused to receive the treasury notes as money. These notes were, as Judge Story says, depreciated before the peace to about half of their nominal value. The British Exchequer bills of those days, which were negotiable by delivery, and were "to be current and pass in any of the public revenues, aids, taxes or supplies, or at the receipt of" the treasury, did not, even after the general pacification, circulate without great variations in the rates of their market values.

The present question of compelling the receipt of the notes as money at their nominal amount in transactions in which the government issuing them has no concern, is, of course, different. This question cannot be stated accurately without a previous inquiry whether a law authorizing their original issue is an appropriate means of executing any constitutional power other than that of borrowing on the national credit, to which their emission has been hitherto referred.

This power is the only constitutional authority for emitting them. In the distribution of powers of national government,

such an authority, if conferred, should be classed among those which concern fiscal subjects. Its primary purposes and relations are exclusively fiscal. Relations of the subjects of it may afterwards become commercial. But, if a general authority to regulate commerce within the United States had been conferred upon Congress by the Constitution, the authority would not have been understood to include such a power as incidental. The Constitution has, however, conferred no such general authority. The authority conferred by it is only to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. This, if we exclude commerce with Indian tribes, applies only to foreign and interstate commerce, and not to internal commerce of the States. Foreign exchanges, of course, cannot be regulated by any law concerning the paper in question, or any paper securities whatever. Commerce with foreign nations would therefore have been out of the question, if the words of the act of Congress had not limited, as they do, its application to debts within the United States. As to such debts, the act, if it could even be considered as a regulation of commerce, would have no specific or distinct applicability to commerce between States.

There can be no implication of a constitutional power enabling the United States to make their bills of credit a tender in payment of debts from the constitutional prohibition of the States to do so. The tenth amendment is, however, invoked in support of an argument that the constitutional powers of the national government should be deemed co-extensive with all powers of which the Constitution prohibits the exercise by the several States. This amendment and the ninth have already been quoted. Nothing in the series of amendments which includes them can lend force to such an argument. They are not grants of power but restrictions of it; and neither powers nor enlargements of power can through implication result from them. Chief Justice Marshall, in reviewing their history said: "The great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained

that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to Union, and to the attainment of those invaluable objects for which Union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general Government, not against those of the local Governments." (7 Peters, 250; see ib. 551, 552; 5 How. 434; 20 How. 89 to 91.) That the amendments were thus intended for security against usurpations of the national government only, and not against encroachments of the State governments, may be considered a truism. But recurrence to historical facts which explain constitutional truisms, cannot be too frequent, if they are in danger of being overlooked in calamitous times, or of being crowded out of memory by any succession of appalling events.

The power to borrow on the national credit being thus the sole source of authority to issue bills of credit, the question to be considered is whether a law to make them a legal tender is constitutional under that power. Here it may be proper to recur to the threefold constitutional prohibition of the States to coin money, emit bills of credit or make anything but coin a tender, and the twofold constitutional omission as to the United States, of express power to emit bills of credit or to make them a tender, though an express power to coin money is conferred. The prohibitions to the States do not impliedly preclude an exercise by the United States of so much of the prohibited powers as may be appropriate and incidental to powers directly conferred upon Congress. Thus, we have seen that bills of credit may be issued in order to pledge the national faith for the payment of money borrowed, and that they may be made receivable as equivalents of money in business of the national government. But the prohibitions and omissions determine the meaning of the Constitution so as to preclude enlargements and extensions of these limited incidental

powers to the character and magnitude of distinct independent powers. In these respects, moreover, the phraseology of the Constitution shows, convincingly, that power to make bills of credit a tender would have been expressly conferred if it had been intended to authorize the national government to make them a tender in transactions not with itself.

When the Constitution was framed, reasons for withholding the grant of such a distinct independent power pressed with saddening force in the organization of a government about to liquidate an immense existing debt of this kind, at the rate of one for forty, if not one for a hundred. The difficulties of inducing an adoption of the Constitution probably could not have been overcome, if the State conventions to which it was submitted had understood it as conferring any such independent power. The twofold omission of express power to issue bills of credit or to make them a tender must, at all events, preclude an implication of either power *as incidental to the other*. Moreover, that each subject is mentioned in the Constitution, prohibitorily, but not otherwise, cannot be overlooked when the existence or extent of any merely incidental power is to be considered. This being premised, what is the argument for the constitutionality of the enactment in question, under the power to borrow on the national credit? The only argument which can be conceived would outstretch the webs of constructive enlargement of the just proportions of the Constitution. It would first be necessary to demonstrate that, if the Constitution had contained an express or direct grant of power to emit bills of credit, Congress would have had an incidental power to make them a tender. Whether this could have been established will not require consideration, because the Constitution contains no such express grant of power to emit bills. Assuming this hypothetical position established, the next position would be that though the power to emit them is not expressly granted, yet, as it exists incidentally to that of borrowing on the national credit, the secondarily incidental power of making them a tender is included. If the constitutional prohibitions, and those omissions of grants of power

which have been considered, were altogether disregarded, this argument could not prevail. If a conversion, by mere implication, of an incidental into a distinct independent power is inadmissible, such a reduplicated conversion by successive implications must be more objectionable.

I am, therefore, of opinion that the enactment is unconstitutional.

Judge CADWALADER having withdrawn from the Court, the judgment was pronounced by Judge GRIER.

Opinion of Judge GRIER:

Coined money, in modern times, forms but a very small portion of the current money used in commercial transactions. Paper money representing credit has long been used as current and lawful money. But no one could be compelled to accept the promise of a bank to pay money, instead of the coin itself. The notes of the Bank of the United States, issued under the authority of the government, were current money and lawful money, because issued by such authority, but were never made a legal tender for the payment of debts.

A contract made in the United States for the payment of a certain number of dollars would be construed as meaning, not Prussian dollars, or Spanish milled dollars, but lawful coin of the United States; the addition of the description "lawful money of the United States" is entirely superfluous and does not change the nature of the obligation. The statutes of Congress always make a distinction between lawful or current money and that which shall be a tender for payment of debts. Hence, we find that when such is the intention, the language is, "*and shall be a legal tender*," etc.

Some coins of the government are a legal tender below a certain amount, but not beyond. Thus, by act of 9th February, 1793, after the expiration of three years all foreign coins except Spanish milled dollars shall cease to be a legal tender.

By act of April, 1806, "Foreign gold and silver coins shall

pass *current* as money, within the United States," and be a legal tender for the payment of all debts, etc., at the several and respective rates following," etc.

Again by act of 28th June, 1834, "The following gold coin shall pass as current money, and be receivable in all payments by weight at the following rates," etc.

Hence we find that in all cases where other money than the coinage of the United States is ordered to be received as current or lawful money, the statute carefully provides the rate and conditions under which they are made a legal tender for the payment of debts. It is clear, therefore, that Congress has always observed the distinction between current and lawful money, which may be received in payment of debts, if the creditor sees fit to accept it, and that which he may be compelled to accept as a legal tender.

It is clear also that if Congress make any other thing than their own coin a legal tender it may define the cases in which it may be used as such. Thus in the act authorizing the national banks, their notes are made a legal tender for certain debts due to the government for taxes, etc., but not for debts due from one citizen to another.

The treasury notes are made lawful or current money, "and a legal tender for debts," etc., as between individuals. As this is the first act in which this high prerogative of sovereignty has been exercised, it should be construed strictly. It is doubtful in policy and dangerous as a precedent.

The only question then is whether this case comes within the letter of the statute.

Is the money which *may be paid* to extinguish a ground rent within the category of the act?

Is it a debt? The owner of the land is not bound to pay it. The owner of the rent can not compel him to pay it. There is no obligation as between the parties. It cannot be converted into an obligation by the election of one of the parties without the consent of the other. A man may execute his bond to me voluntarily, but unless I accept it he does not become my debtor.

These ground rents, in the nature of a rent service, are somewhat peculiar to Pennsylvania, and little known in other States. But the Supreme Court of the State has very clearly settled and determined their nature. The cases are too well known to the legal profession to need quotation. "A rent service," says the Court in Bosler *v.* Kuhn (8 Watts & Sergeant, 186), "is not a debt, and a covenant to pay it is not a covenant to pay a *debt.* The annual payments spring into existence, and for the first time become debts, when they are demandable."

I am of opinion, therefore, that the tender offered by the bill in this case is not authorized by the statute, and that the respondents cannot be compelled to extinguish their estate in the land, by such a tender as that now made. The bill must, therefore, be dismissed.

CIRCUIT COURT. JULY 17, 1865.

HABEAS CORPUS.

ROBERT M. LEE'S CASE.

1. A person accused of a series of crimes, under each of two distinct heads, was, after a regular commitment, liberated upon a recognizance of bail, on the usual condition to appear in court to answer any charges, and not depart without leave. Under one of the heads of accusation, three bills of indictment were afterwards found for certain of the offences with which he was charged. He was tried under one of these indictments and convicted. Before sentence he absconded. Having been afterwards arrested and brought into court, he was under this conviction sentenced to pay a fine and undergo a certain imprisonment. By a special pardon this imprisonment was remitted, on condition that the fine should be paid. The pardon did not apply to the charges in the other two indictments for offences under the same head of accusation as the offence of which he had been convicted, nor to any of the offences charged under the other head of accusation. The fine having been paid, and his imprisonment under the sentence having been terminated by the pardon, he was in custody under a recommitment to answer the other charges. Upon a subsequent application by him to be admitted to bail, his flight was considered such a wilful breach of the essential condition of his liberation upon bail, that his privilege of such liberation had been forfeited.

2. This forfeiture of the privilege was independent of, or collateral to, the contempt of court which had been incidental to the wilful breach of the condition. Therefore after the contempt was purged, or sufficiently

punished, his detention in custody, without admission to bail, might be continued under the recommitment.

3. A renewal of the forfeited privilege of liberation upon bail was not demandable of right; and could not be reasonably asked of grace, nor allowed under an exercise of properly regulated judicial discretion, because it was apparent, from his former flight, that if again thus liberated, he might probably again abscond.

4. But beyond the proper duration of imprisonment for the contempt, his detention without admission to bail should not be prolonged except for the purpose of secure custody till trial or other lawful deliverance from commitment.

5. The forfeiture of the original privilege of liberation upon bail involved no forfeiture of his ulterior privilege of deliverance—either by trial or otherwise—without unreasonable delay. If a new privilege of deliverance on bail arose from delay of trial, the only proper effect of the forfeiture of the original privilege would be upon the amount of bail requirable, and the number of sureties. And if he would otherwise, from unreasonable delay of trial, be entitled to an absolute discharge, the forfeiture of the original privilege might not prevent such discharge.

6. The charges against him under the same head as the offence of which he had been convicted were so complicated with it, that all of them had necessarily been considered in determining the measure of the punishment in the sentence to which the pardon applied. The indirect effect of the pardon therefore was that if he should be convicted afterwards of another offence *under that head,* his punishment would be but nominal. In determining the punishment imposed by that sentence, none of the charges against him under the *other* head of accusation had been thus considered. But under this other head no indictment had been found for any one of the offences charged; and from the past and inevitable future delay, it was apparent that if hereafter indicted for any of them, he would not be triable under such new indictment until after a longer imprisonment than would be allowed without admission to bail in a case originally not bailable. The circumstances were such that this would have been the case if he had not absconded. He was therefore admitted to bail, but in an increased amount, with an addition to the ordinary number of securities.

CERTIFICATE of indictments with recognizance of bail from the District to the Circuit Court under the 3d section of the act of Congress of August 23, 1842.

The questions decided arose in prosecutions for the violation of the enlistment laws of the United States, viz.: the fraudulent credit of spurious enlistments with the view of obtaining the bounties offered by Congress and the States—a species of crime unfortunately too common during the civil war.

CADWALADER, J.

Persons accused of crime who have been committed to official custody, are in ordinary cases entitled to immediate judicial liberation upon bail. In ordinary cases, and also in other cases, accused prisoners have the less immediate right of speedy trial according to the due course of procedure; and if their trial is arbitrarily delayed, become entitled to liberation, as justice may require, either on bail or absolutely. A person committed for contempt has none of these privileges in respect of such commitment. His imprisonment in this respect is under an adjudication of contumacy. If the contumacy has occurred in the course of proceedings in which he is charged with crime, the proceeding as to the contempt, is, nevertheless, considered as in this respect, collateral to the proceedings under the original prosecution. The question of contempt, in the present case. will be considered hereafter. In the meantime the case will be considered as if it involved no question of contempt.

Under the laws of the United States a prisoner accused of crime must be admitted to bail in all cases except where the punishment may be death, and in cases in which it may be death, judicial discretion is exercisable on the subject. This party has not been accused of any offence punishable with death. He was, therefore, when originally committed, entitled, of course, to liberation upon bail. He was admitted to bail accordingly upon the usual condition to appear in the District Court to answer any charges, and not depart without leave.

The subjects of prosecution were two, similar in their general character, but entirely distinct as to the series of individual transactions involved in them respectively. One of these general subjects was an alleged enlistment, or spurious enlistment, of eighteen recruits credited to a certain division of the Seventh Pennsylvania District. An incidental forgery of enlistment papers was alleged. The other general subject was an alleged similar transaction as to twenty-two recruits credited to one of the divisions of the Eleventh District. Here also a forgery of enlistment papers was alleged. Every one of the forty al-

leged enlistments in the two districts had, or may have had, its own distinct papers; and every one was apparently the subject of two distinct accusations of crime. One accusation was under acts of Congress concerning forgery, the other under the act against procuring or attempting to procure desertion. It would have been a censurable multiplication of prosecutions to have indicted him under these eighty charges. Three indictments were found by the grand jury at the last February sessions of the District Court. These indictments applied severally to each of three of the alleged enlistments of recruits for the Seventh District. One indictment was for the forgery of enlistment papers of one of these alleged recruits. The two other indictments were each for procuring the desertion of another alleged recruit for the same district. These three indictments were, in March last, each certified, with the recognizance of bail, into the Circuit Court under the third section of the Act of 1842. Under that act the recognizance has, in the Circuit Court, the same effect as it would have had in the District Court if the cases had remained there.

No indictment was either found or ignored by the grand jury as to any case of the alleged enlistment of recruits credited to the Eleventh District. It is therefore presumable that no such indictment was laid before the grand jury. The prosecution as to cases under this head remains, I believe, precisely as it stood when the accused was bound over to answer in the District Court.

The certificate to the Circuit Court was thus exclusively of prosecutions relating to alleged enlistments, or spurious enlistments, for the Seventh District. At the last April sessions of the Circuit Court, the indictment for forgery was tried. According to the minutes of the court, the defendant was present during the trial, and, the jury having retired to deliberate upon their verdict, were returning into court, when he disappeared. He was called, and, not answering, the default was recorded, and a bench warrant for his arrest was issued. The recognizance was also adjudged forfeited. By the verdict, which was then taken, he was convicted under this indictment. This

was on the 7th of April. The other indictments have not been tried.

The bench warrant was not executed for more than seven weeks, during which time it is legally presumable that search for him was prosecuted with due official diligence. There was no voluntary return to custody; nor any surrender by bail or otherwise. He was, at length, however, found and taken into custody, where he remained until the first of this month.

On that day he was brought into court; and, under the indictment which had been tried, was sentenced to pay a fine, and undergo an imprisonment in the penitentiary of the State. On the 10th instant, the President, by a special exercise of the pardoning power, remitted the imprisonment on condition that the fine should be paid. This condition having been complied with on the 11th, the defendant was discharged from the penitentiary. There was, apparently, nothing in the pardon to affect the prosecution under the two untried indictments. The attorney of the United States, on the 11th, observing this, moved in the Circuit Court, that the defendant be committed under those indictments. Upon this motion, before his removal from the penitentiary, such an order of commitment was made. He was received from the penitentiary into the custody of the marshal, whose duty it would have been to resume the custody of him if the last mentioned order of the court had not been made. The marshal's custody, except as affected by this order of commitment, is now the same custody in which the defendant would have remained if he had never been in the penitentiary, but had been acquitted by the jury in the case in which he was convicted and afterwards pardoned. He would then have been detained for trial under the other two indictments. The marshal's custody, or his right of custody, continued during the imprisonment in the penitenitary, though his right of actual detention of the prisoner was qualified or suspended by the detention in the penitentiary. If these points were doubtful, the order of commitment of the 11th instant would make them quite immaterial. Whether this order was a recommitment, or a commitment, would be a trivial inquiry. It was, whichever

phrase best applies to it, a *commitment*, as distinguished from an *arrest*. The commitment, moreover, was not such a one as may occur after hearing under an arrest, but such as may occur in ulterior stages of criminal procedure. The party committed was already subject to the police of the court, and, as the record proves, had broken the condition upon which he had been liberated on bail. No explanation, or excuse, of his absconding—for such appears to have been the character of the breach of the condition of liberation—has been suggested.

On 12th instant, a motion was made on his behalf, in the Circuit Court, for leave to enter bail. His counsel pressed the motion upon the ground of the pardon, and upon the general course of practice in those ordinary cases of default in which the condition of recognizances of bail is always considered as a mere penalty to secure punctual attendance. The general applicability of the special and conditional pardon to offences not mentioned in it could not be admitted. This pardon cannot apply directly to the charges in the two untried indictments. What may be its indirect application to them will be considered hereafter. I did not think that the course of practice in the familiar ordinary cases of default which had been mentioned, furnished a rule of decision for an aggravated case of such wilful flight as might, not improbably, occur again if an opportunity were afforded. But the counsel seeming to insist that even in such a case, a renewal of the privilege of liberation on bail was demandable of right, I suggested that upon the return to a writ of habeas corpus addressed to the marshal, the question might perhaps be more fully developed. The application for this writ was therefore substituted for the motion. The writ having been issued by me, not as judge of the District Court, but as a judge of the Circuit Court, and having been addressed to the officer of the court, the prisoner has, upon this officer's return, the benefit of every argument which could have been available in court on the original motion. The return, however, states no fact which does not appear in the records of proceedings already mentioned, and concludes with a general reference to the proceedings of record. Nothing on

the part of the prisoner to alter the case exhibited by them has been suggested. The question whether he should be admitted to bail stands therefore precisely as it did upon the original application.

The points of inquiry are:

1. Is the renewal of liberation upon bail demandable in this case *of right?*

2. Should the privilege be renewed *of grace*, in other words, in the exercise of regulated judicial discretion?

1. The inestimableness of the privilege of liberation upon bail, as a safeguard of the right of personal liberty, is not, nor is the original extent of the privilege, here in question. The question is, upon what condition the retention of the privilege by a party who has already been liberated on bail depends of right, or upon what condition his right of demanding a renewal of the privilege depends. The question, as it will soon be narrowed, is, upon what condition may an accused person who, after proper arrest and hearing, has been duly committed to official custody, demand liberation from such custody.

Here two converse propositions may be stated; the first, that persons accused of crime should never, until conviction, be under any personal restraint, except such as is necessary and proper for securing their attendance in court to answer any charges, and for preventing their departure from court without leave; the second, that persons regularly committed cannot reasonably ask liberation except upon the essential twofold condition that they will thus attend in the proper court, or courts, and will not depart thence without leave.

The proposition which is to be considered and applied is the second. It is expressed in the condition of the recognizances usually taken when parties who have been thus committed are liberated from official custody. Such recognizances neither create the condition nor define it originally. The recognizance of a prisoner liberated *without* bail, or surety, is upon this condition. In such a recognizance, he is usually bound in a certain sum of money. But this might be omitted. If he should be simply liberated by a court from the custody of its

officer on condition to appear in the court at the next term, and not depart without leave, the acknowledgment of this on record would have the same effect as in a recognizance of the usual form. The condition is that prescribed by law,—or that which may be lawfully prescribed,—in every case of liberation from such commitment.

When sureties of the party liberated are bound of record for his fulfilment of the condition, the record of *their* engagement on this behalf becomes a recognizance *bail.* He is then, in legal phraseology, *delivered* to his friends who thus engage that he will fulfil the condition. That he may be relieved from the personal restraint which is unavoidable under an official custody, they become, as it were, his private jailers. They are so designated in books of authority. Though there cannot be a lawful private prison, understood as a place of compulsory detention, there may be such private jailers of a prisoner's own choice. This designation applies practically to the bail so far, at least, that they may, at any time, surrender him, and thus relieve themselves of responsibility for his fulfilment of the condition. In cases of such surrender, he commits no breach of the condition, and retains, therefore, unimpaired, his right of liberation upon bail. He may thus avail himself of the privilege as often as occasion may, in this, or in any other manner, occur without his own inexcusable default. His original privilege still subsisting, it is not *renewed* when he thus, from time to time, avails himself of it *anew.*

But, after an unexcused, and unatoned *wilful* breach of the essential condition of the privilege of liberation upon bail, the privilege does not continue to exist; nor is a renewal of the privilege then demandable of right. The application of these remarks to the present case must be obvious.

Here a few words on the question of contempt may be proper. That the act of this party was an aggravated contempt of court is indisputable. The police of a tribunal of criminal jurisdiction could not be maintained without an occasional cognizance of contempts less aggravated, consisting in the mere non-attendance of parties. For such contempts, parties who have

abused the privilege of liberation upon bail must occasionally be committed. I have had occasion thus to commit a party to temporary custody where the recognizance of his bail was not forfeited; and this might happen where a forfeiture of it had occurred, and had, as to the bail, been respited. If a privilege of renewed admission to bail continued to exist, notwithstanding any breach of the condition of the original liberation upon bail, the commitment for contempt would prevent actual liberation. An absconding party retaken and committed for the contempt should not be liberated so long as his detention may be necessary to maintain the police of the court, and prevent him from absconding again before trial. Beyond the detention for these purposes, his imprisonment for the contempt should not ordinarily be prolonged. But he might also in some cases properly be fined for it. These are questions which cannot ordinarily arise under a writ of habeas corpus, because a party committed for contempt cannot ordinarily, under this writ, dispute the lawfulness of such a commitment. In the present case the privilege of liberation upon bail has been forfeited independently of any question of contempt. When the contempt has been purged or punished the strict custody of a party who has thus forfeited the privilege may be necessarily continued in order to secure his presence at a future trial.

2. The second point of inquiry is thus reached. It is whether, through the regulated exercise of judicial discretion, the privilege which this party has thus forfeited should be renewed in his favor. In ordinary cases the renewal of the privilege when forfeited, or the respite of the forfeiture, is so much of course, that the form of the question is usually overlooked. Thus the question whether the privilege had been forfeited by an accused party is very seldom even considered, whatever consideration may be given to the question whether his bail should continue pecuniarily liable. The privilege, when the contempt has been purged, ought, upon payment of the official charges incurred, to be renewed in almost every case, and often without any such payment. Perhaps the only case in which the privilege ought not to be thus renewed may be where it is apparent that the party

thus asking grace might probably abscond if it were granted. The present is, unfortunately, a case of this kind.

What has heretofore been called, for want of a suitable designation, the indirect effect of the pardon, must however be considered. Here the two general subjects of the prosecution, which have already been mentioned, must be considered separately.

As to the indictments which were certified into the Circuit Court, if the defendant had been acquitted of the forgery of which he was convicted, he might afterwards fairly have been tried for the procurement or attempted procurement of desertion. But after a conviction under the former charge, he probably would not have been tried under the latter. In the sentence of the first instant, the measure of his guilt in all the eighteen cases of alleged enlistments credited to the Seventh District was considered by the court. The remission of his imprisonment under that sentence ought, I think, to have the same effect as if he had undergone the imprisonment. Should he be convicted hereafter under either of the two untried indictments, I, therefore, doubt if any other than a nominal punishment would be imposed. Therefore, if accusations relating to alleged enlistments for this district were alone in question, the propriety of detaining him in strict custody would be so doubtful, that I would probably at once admit him to bail, and if he should not be tried at the next term would then probably discharge him absolutely.

The question is different as to the twenty-two cases which compose the second of the two general subjects of accusation. These, it will be recollected, were cases of alleged enlistments of recruits for the Eleventh District. The certificate to the Circuit Court included no indictment under this head of accusation. As has already been stated, no such indictment has been as yet found. The accusations under this head were not considered in determining the measure of punishment when the sentence was imposed. In these twenty-two cases he continues liable to prosecution; and I cannot perceive that under this head the prosecution can be directly or indirectly affected by the

special pardon. His recognizance applied not less to these cases than to those upon which indictments were found and certified into the Circuit Court. The transmission to that court of the recognizance did not alter its effect as to the District Court. If a recommitment were necessary, the fact that when liberated upon bail he had broken the condition of such liberation would appear of record, and would be the cause of recommitment.

Independently of any question of contempt, a party who, having thus forfeited his original privilege of liberation upon bail, is detained in strict custody, does not forfeit certain ulterior privileges which have been mentioned. Thus, he may still demand a speedy trial; and if trial is refused after the latest proper time for it, may then obtain liberation upon bail, or may through the course of jail delivery or otherwise, obtain absolute liberation. Admission to bail as the means or mode of deliverance from detention unduly prolonged, may thus be demandable as of right, though the primary privilege has been forfeited. In taking bail in such a case, extraordinary caution as to the amount and as to the number and sufficiency of the securities may be necessary. But these would be merely incidental subjects of consideration.

On the whole case of this party, he should not be admitted to bail unless it appears that he cannot have a trial without greater delay than is incidental to the regular course of procedure. If an indictment had been heretofore found as to any one of the last mentioned twenty-two cases, whether it had been certified into the Circuit Court or not, I would not admit him to bail, but it would hold him for trial at the August sessions of the District Court, or October sessions of the Circuit Court. Afterwards, if the case should not have been tried, the question of admitting to bail might arise. But as no such indictment has been found, the past as well as probable future delay must be considered. For such delay the law officers of the United States who have conducted the prosecution cannot be censurable, because it may be assumed that the special pardon was unforeseen by them. But the accused, however, otherwise to blame, is not in this respect, in fault. He ought not to

be detained for an extraordinarily long time in strict custody for any reason arising from the fact that he has received the special pardon. In this case the question of past and probable future delay is complicated with peculiar considerations.

The transactions upon which the prosecution is founded occurred in September last. Notwithstanding the unavoidable protraction of the preliminary investigations, bills of indictment might have been laid before the grand jury for either the February or May sessions of the District Court. Such bills may be prepared for the grand jury at the approaching August sessions. Should they be found, the course which I might adopt in retaining them in the District Court, or certifying them into the Circuit Court is perhaps doubtful. This would be immaterial if there could be any definite probability of trial at the first regular sessions of either court. But there cannot, from the character of legal proceedings, be any such definite probability. After two terms, at both of which it has been possible to indict and try an accused prisoner according to law, he, in ordinary cases, becomes entitled to an absolute discharge. (See 5 Casey, 135.) In this case, no indictment will have been found at the earliest, until the third term. If the accused party had not abused his primary privilege of discharge on bail, he would now be entitled not to a mere discharge on bail, but to an absolute discharge. To refuse to admit him to bail under such circumstances, would therefore, perhaps be an excess of strict custody. Should bail be taken, the decision will not be a precedent for any probable case of another party who may, by absconding, have broken the condition of his original liberation upon bail.

I have great doubt of the correctness of the decision which I am about to make. But, every doubt which reason cannot remove should be resolved in favor of personal liberty. I will therefore admit this party to bail in $10,000, with three sureties, each in $5,000, for his attendance at the next District and Circuit Courts. The recognizance of bail will be in such form that more than $10,000 in the whole will not in any event be payable by the sureties, and that $5,000 will be the greatest amount payable by any one surety.

DISTRICT COURT. OCTOBER 18, 1865.

ADMIRALTY.

HIGGINS *v.* COTTON PER PRINCE ALFRED.

The finder of derelict goods thrown overboard by a blockade runner can have no proprietary right therein; but policy requires that the award of salvage in such cases should be liberal.

PRIZE CLAIM for salvage.

CADWALADER, J.

No proprietary claimant having appeared, this cause came on for a hearing, upon the application of the original libellant, claiming, as finder of the derelict cotton in question, the residue of the proceeds thereof as his property. The Court, as at present advised, is not prepared to recognize any such proprietary right as existing in the finder of derelicts at sea; but, for as much as the question is pending in other cases, no definitive opinion on this point is expressed.

In this case, it was understood that the question of the right of the finders to additional salvage was to remain open for consideration in the ultimate stage of the proceedings.

The Court is of opinion that, as between the finders and the United States, the salvage heretofore awarded is an insufficient remuneration for the service rendered. It was of great importance that the finder of cotton upon the blockaded coasts of the hostile revolted districts, thrown overboard, as it probably was, by blockade runners to avoid capture, should have every inducement to bring it into a port of the United States.

To carry the policy of holding out such inducements into effect, cases might occur in which the whole nett proceeds of the property should be awarded. I think this a case of the kind. The captain of the vessel which saved the cotton ought, I think, to receive an additional $50;* after which the nett proceeds, deducting as well the charges of the United States as all others, ought to be divided in the same proportions of one-third to the

* Being double the original award.

vessel, and the residue to and among the officers, including the captain and the crew, in the proportions of the former distribution.

CIRCUIT COURT. JANUARY 20, 1866.

EQUITY.

THE AMERICAN WOOD PAPER COMPANY *v.* JACOB D. HEFT & COMPANY.

1. A reissue of a patent cannot be made to cover an invention which is the result of experiments made at times subsequent to the original issue.
2. A subject is within a patent where it requires like treatment in the manufacture with the one mentioned in the specifications and where, by necessary inference, their language is applicable to it.
3. A patentable *product* distinguished from the *process*.

BILL to restrain infringement of patent.

H. E. Wallace and *F. A. Jenckes*, for complainants.
George Harding, for respondent.

Judges GRIER and CADWALADER were divided in opinion. The opinion of each is given.

The facts will sufficiently appear from the opinions.

CADWALADER, J.

As to the patents for alleged improvements in the boiler, or its appendages, it may suffice to say, that so far as the alleged inventions may have been patentable and new, they have not been infringed.

The other patents on which the bill is founded require careful consideration. I regret that the early departure of the Circuit Judge for Washington, renders a decision so soon after argument necessary.

Watt and Burgess, practical chemists, on the 19th August, 1853, obtained a patent in England. On 18th July, 1854, they obtained one from the United States for the same alleged invention, for fourteen years from the date of their English patent. The patent from the United States, and a reissued patent

which was substituted for it, have been successively surrendered, and a second reissue has been obtained. This reissue was in two patents dated 7th April, 1863, Nos. 1448 and 1449. Each describes a process for boiling fine shavings, or cuttings of wood, or other vegetable substances, in a solution of caustic alkali, in a close vessel, under a high pressure, in order to obtain a pulp fit for making paper, the length of the time of boiling, and the strength and heat of the solution graduated respectively to one another, and to the more or less refractory nature of the vegetable substance to be thus treated; the duration of such boiling from four hours to twelve; the strength of the solution from 17° to 12° or 10° T. (corresponding with 12° to 8½° or 7¼° B.); and the heat ordinarily "at, near, or above" 300° F., which might, however, be raised to 500°. This means a minimum heat, not much below that indicated on the steam gauge as due to a pressure of fifty pounds to the square inch, which heat might be increased as required. The pressure appears, from the evidence, to be no further useful than as the required heat of the liquid above 212° cannot be imparted except under pressure, nor measured otherwise than by the degree of pressure as indicated on a steam gauge. The specification implies that the graduation of the heat, the strength and the duration, were to depend, in a great measure upon experience, not restricted within any narrow limits. Their graduation to the nature of the vegetable substance, whatever it might be, is expressly required in the specification. Their adjustment or graduation to one another, as occasion might require, though not expressed, is obviously implied.

The claim in the specification No. 1448 is of the invention of a pulp suitable for the manufacture of paper made from wood, or other vegetable substances, by boiling in an alkali, under pressure substantially as described. The claim in the specification of No. 1449 is the invention of treating wood, or other vegetable substances by boiling in an alkali, under pressure, as a *process*, or *preparatory process*, for making pulp for the manufacture of paper substantially as described.

The invention claimed in these two patents, whether that of

a product, or that of a process, depends wholly upon boiling in an alkaline solution in a close vessel with such graduation of heat, strength, and time to one another, and to the refractoriness of the material, as may produce a suitable pulp at one operation.

The question is whether Watt and Burgess invented either the product or the process at or before the date of their English patent of 19th August, 1853, to which the American patents relate.

Before this date and before any maturity of their previous experiments, a pulp fit for making paper had been obtained by others from such fibrous substances as wood and straw, through the use of different processes for disintegration of the fibres. In every such case the process had been one of successive stages. The substances had been boiled in an alkali, strong or weak, in open vessels and in close ones, under pressure and without pressure. The process had never been such as to produce the pulp at one operation. In some cases the boiling itself had been repeated. In all of them there had, besides mere soaking and cleansing, been a succession of mechanical or of chemical treatments, or of both, with applications of heat. But, as I have already said, a suitable pulp, that is to say, cellulose approximately pure, had, through some of these former processes been obtained from both wood and straw. It is thus very clear that Watt and Burgess did not, nor did either of them, invent or discover the *product* as distinguished from the *process*.

As to the *process*, it was, on the part of the defendants assumed that the case must be decided upon the patent No. 1449 alone; and, independently of the question whether the process in itself was new, the argument was urged that this patent was invalid because it claimed too much. The claim in it is for the invention of a process, or *preparatory* process. The novelty, if there was any, consisting wholly in the singleness of the process, it could not, according to the argument, be considered new as a *preparatory* process. Perhaps the phrase *preparatory process*, in the specification of this patent, has not precisely the meaning which this argument attributes to it. Pulp which is

already fit for making brown paper requires *bleaching*, in order to render it suitable for making white paper. If no further treatment than suffices to whiten the pulp is required for the latter purpose, the same process which suffices to *finish* the pulp for making brown paper, is thus, in a relative sense, preparatory as to white paper. If this were otherwise, the objection to the patent could be removed by a disclaimer, as was done in Morse's Case, 15 Howard, 120, 121. It is, therefore, unnecessary to inquire whether the difficulty might not also be avoided by recurring to the patent No. 1448, which is not simply for a product, but for the product *as made* by the *single* process described.

The specification will therefore be considered as including a legally-sufficient claim of the invention of the process of boiling in an alkaline solution in a close vessel with such a graduation and adjustment of heat, strength, and time as will produce the pulp at a single operation. That the process thus claimed, if actually invented by Watt and Burgess at any time not later than the date of their English patent, was *new*, is, I think, on the evidence, unquestionable. Therefore, if they had invented it by the 19th of August, 1853, the reissued patent must be sustained.

The evidence upon the question of fact as to the alleged invention of this date, consists of the testimony of Mr. Burgess, and his manuscripts which have been preserved; the specifications of the English patent, and of the first patent obtained from the United States; the correspondence and other papers on file in the Patent Office, and the specimens deposited there. Let us consider first the documentary evidence, and afterwards the testimony of Mr. Burgess.

It is quite clear from all the writings which are not of date subsequent to the American patent of July, 1854, that what was patented and what it was intended to patent in 1853 and 1854, was an alleged invention of a process of successive stages, one of which was boiling in an alkali, and that such boiling *might* be under pressure, but that this was *optional*. The patentees did not intend to describe, or to claim, any process completed at

one operation, to which boiling under pressure was indispensable. It may be said that there is, nevertheless, no absolute impossibility that they had invented such a process; and that the legal question under the reissue is not what they had intended to patent, but what they had, in fact, invented. This, in the abstract, is true. But its mere legal truth does not lessen the immense improbability that they had in fact invented or discovered the process.

Nor is this improbability diminished by the testimony of Mr. Burgess, that economical considerations may have influenced the patentees to suppress, at the time, a part of their supposed invention. His testimony, as given to this effect at this late day, does not go by any means, to the extent assumed in the argument for the complainants. If the matured invention had been fully conceived by him, it is probable that motives of economy would, on the contrary, have suggested the idea of elevating the temperature in order to reduce the quantity of alkali used. The experiments of Watt and Burgess in England were begun in 1851, and there is nothing in the testimony of Mr. Burgess to induce a belief that by 19th of August, 1853, either of them had made any experiment with a view to such a simultaneous graduation of the time of boiling, and graduation of the heat and of the strength of the solution, as was required for a process of only a single stage. He testifies that in a laboratory in 1852 he produced a pure pulp by boiling in a caustic alkaline solution. But how long it was boiled he does not state, nor of what strength was the liquid. He says that he had not the means at his disposal for determining the pressure used. How many, or what were the stages of the process, he does not mention. He left England for the United States in the early part of 1854. The single previous experiment in which he had made a pulp at one *operation* occupied only about twenty minutes, when he was alone in the laboratory. On this occasion he put about a pound of pine wood into a wrought iron mercury bottle of the size of about 14 by 6 or 8 inches. He could not recollect the strength of the solution, and had no means of determining the pressure. There was no ascertain-

ment or estimate of strength or heat or time, much less graduation or adjustment of them; nor was there any attempt at either, unless it consisted in the simple use of *extreme* heat. From the shortness of the time, the pressure must (if the material was crude) have been very high, far above the extreme of tension for any working purpose. He does not appear to have had any mental conception of such a practical process as the patents of 1853 describe.

Great care in referring the different parts of his testimony to the proper periods must be observed, or it may be misapplied. In 1854, after the American patent of July in that year, he recommenced experiments in this country, and before the end of the same year had approximately matured them. Whether he then attained a sufficient knowledge of the process afterwards described in the reissued patents of 1863 cannot be material. If such was the fact, and if Mellier had not obtained his patent in the meantime, it would be the misfortune of the complainants that Mr. Burgess did not apply for an independent patent in the latter part of 1854, instead of referring his new invention, by the reissue, to the patent of August, 1853. But the misfortune could not be judicially remedied. No such invention had been made at that time, and consequently the bill, so far as it rests upon the patents of reissue must be dismissed.

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paper. The improvement, he says, consists in subjecting straw or such other fibrous materials to a pressure of at least seventy pounds on the square inch, when boiling such fibrous matters in a solution of caustic alkali. For this purpose the straw, or fibrous matters, are cut, soaked, and cleaned, and then placed in a suitable boiler. He prefers a temperature to produce at or above eighty pounds on the square inch *in the boiler* containing the fibrous materials; but says that so high a temperature is not absolutely necessary, for he has found by experiment a temperature equivalent to seventy pounds on the square inch essential. The quantity of alkali used is at the rate of about sixteen per cent of the straw or fibrous substance under treatment. In describing the details of the process, he says that the heat is to be raised to such a degree as to attain and maintain *for a time* an *internal* pressure *equal to, or exceeding seventy pounds* on the square inch, that is about 310° Fahrenheit, by which A CONSIDERABLE SAVING OF ALKALI as well as TIME and fuel, results, as compared with former means of using a caustic alkali in preparing straw and other fibres for paper makers. He adds, that by submitting the straw or similar fibrous materials to a pressure of between seventy and eighty-four pounds on the square inch *inside of the boiler*, he can reduce considerably the proportion of alkali, and that the solution which he *preferred* to use was to be from two to three degrees Beaumé, and at the rate of about seventy gallons to each cwt. of straw or other fibrous vegetable matters requiring like treatment; and that he found it *desirable to keep up the heat* and pressure during *about three hours after the above pressure obtained.* After further washing, the straw or fibre may, he says, be *bleached* in the ordinary manner, and this will be found to be accomplished by a comparatively small quantity of chloride of lime.

He declared that he did not claim the general use of caustic alkaline solutions, nor the employment generally of a close boiler for boiling straw or other vegetable fibrous substances, but claimed the process for *bleaching* straw consisting in boiling it in a solution of pure caustic soda from two to three degrees

Beaumé, at a temperature not less than 310° Fahrenheit, after it has been soaked and cleaned, and before submitting it to the action of a solution of chloride of lime from one to one and a half degrees substantially as described.

In this claim and in the body of the patent, the word *bleaching* is used with applications chemically the same, but practically somewhat different, through difference in degree. The word signifies, in the claim, a *disintegrating*, and in the body of the patent a mere *whitening* process.

The reason for giving so full an abstract, almost a transcript, of the material parts of the specification, with some of its repetitions of the same phrases, will appear as we proceed.

In the meantime we may remark that wherever the number of pounds of pressure is mentioned by Mellier, he means the internal pressure, exceeding by fourteen and seven-tenths pounds the pressure as indicated on the steam-gauges here in use, the difference being the weight of the atmosphere. This difference must always be considered in comparing this French expression of the measure with the usual expression of it in this country. Thus the measure of seventy pounds in the specification of Mellier corresponds with about fifty-five pounds on the steam-gauge here in use. His French patent mentions a pressure of five or six atmospheres. From the less extreme, five atmospheres, the deduction of one for this difference, leaves the minimum four atmospheres, not quite fifty-nine pounds. An observation of less importance is that the tables used by him, according to which the degrees of heat are tested by the pressures, must have been somewhat inaccurate. Thus in the specification of his American patent, he gives seventy pounds, or, as indicated on our steam-gauges, about fifty-five pounds as the pressure due to a heat of 310° Fahrenheit. The pressure due to such a heat should have been stated as internally about seventy-four pounds, or, as indicated on the steam-guages, about fifty-nine pounds. So in his English patent, he mentions eighty pounds on the square inch as the pressure due to a heat of about 322° F., whereas the internal pressure due to such a heat is about eighty-seven pounds, and the pressure as indicated

on our steam-gauges about seventy-two pounds. These comparisons are facilitated by the tables annexed to Dr. Rand's testimony.

It is argued for the defendant that the process described in this patent applies to straw alone, or is limited to it by the claim, that the patentee was not the first person who succeeded in applying the process even to straw, and that, if he was, the claim is limited to the use of a temperature not below 310° F., which he defines as seventy pounds to the square inch, internal pressure (corresponding with a pressure of about fifty-five pounds, as indicated on the steam-gauge), that the pressure used by the defendants is below this, and that consequently they do not infringe the patent.

I do not think any part of this argument maintainable. As I understand the specification, it describes, in substance, the process afterwards claimed in the reissued patents of 1863, as the invention of Watt and Burgess. If so, Mellier would appear to have been the first person who discovered that the temperature and strength of the solution and the duration of the boiling could, in practice, be so graduated and adjusted as to produce the pulp at one operation.

The claim does not, in the apparent purpose of that part of it which mentions straw, resemble in all respects the claims ordinarily found at the foot of specifications of patents. If it did, it would limit the application of this patent to straw alone. But there is, in this respect, very little resemblance to such ordinary claims. The intended subjects of the process patented are explicitly and repeatedly designated in the specification as straw, *and other fibrous vegetable substances requiring like treatment* for the purpose in view. This treatment is exemplified with the requisite descriptive precision in the type case of straw. The description of this application of the treatment suffices to enable a skilful person to apply it to other substances requiring like treatment. Such a person ought to know, and if he did not, passages in the specification would instruct him, that with a crude fibrous vegetable substance, more refractory than straw, a stronger alkali, or a greater heat, or a longer time of boiling,

would be necessary. In the application of the treatment to such a substance, the proportions which were as yet untaught by science would be tested by future experience. The case of straw best exemplified the "considerable saving of alkali as well as time," etc., which the specification mentions. But a solution in which, at a certain temperature, straw could be made into a pulp in a certain time, would, if the strength were increased, and the time of boiling prolonged, serve to make wood into pulp, in the same close vessel, with, or perhaps without, an elevation of temperature. With an elevation of temperature the wood might be made into a pulp in the same time as the straw, or in a time somewhat longer, and, perhaps, in a solution of somewhat greater strength. Experience would furnish and test the standards.

The substances must, indeed, be such as require *like treatment* with straw for the purpose in view. But what is this purpose? It is to obtain cellulose approximately pure by disintegration. A fibrous vegetable substance which is ligneous, is not the less an object of this purpose because it is ligneous, if the treatment of it should be similar, and differing only in graduation and adjustment.

That the treatment required for straw and for wood are not otherwise different appears, beyond a doubt, from the answers of the defendants in this case, and, from the same report of the viewers who witnessed the processes at the defendants' manufactory. Their answer describes the process then and previously used by them in making pulp for paper from wood, and also in making it from straw. They at first treated wood with a solution of caustic alkali of the strength of 12° B.; but afterwards found a strength from 4° to 6°, say 5°, to answer best. For straw they state that they have used a strength of about 3° B. For both wood and straw they state the pressure as between fifty pounds and sixty pounds, not exceeding sixty pounds. In the subsequent experiments at the manufactory, they used a pressure generally somewhat lower, but with a more than corresponding increase in the strength of the solutions.

The claim of Mellier sums up the specification so far as it had exemplified the application of the general process in the specific treatment of straw, which, when boiled in a solution of only 2° or 3° B., requires a temperature of at least 310° F., if this heat of the liquid is to be maintained, as he suggests, for only three hours. But in a solution of greater strength, like that used by the defendants for straw, with a cooking process continued for a longer time, as theirs was in the experiment witnessed by the viewers, the specification implies that a lower temperature would suffice. In Mellier's French patent the time of boiling mentioned is, instead of three, six or eight hours, and the strength of the solution, instead of 2° or 3° B., is 3° or 4° B. The French patent described the process as consisting in the production of a pulp, either white or of a color fit for the manufacture of paper from straw or other fibrous vegetable matters; and, in describing the details, occasionally mentioned straw without mentioning other materials.

Independently of recurrence to Mellier's French patent, I think his patent from the United States maintainable as to both wood and straw. I also think that the defendants have infringed as to each, and that if the patent were limited to straw, there should be still a decree for the complainants. But I am not of opinion that such an absolute restriction is within the fair import of the specification.

The difference of opinion upon the bench applies to this patent only. But it prevents a decree for the complainants. Their bill must be dismissed in order that they may be enabled to appeal. The dismissal should be without costs. If the decree had been in their favor, it should, I think, have been without costs.

OPINION OF GRIER, J.

1. That the reissued patents of 1863 are illegal and void requires no further reasons than those alleged in the answer and clearly substantiated by the evidence.

Mellier's patent is intended for *straw* alone, *et similia.*

He was not the first to succeed in this enterprise.

His patent must be construed by taking a view of all its parts.

He says his invention consists in subjecting straw to a pressure of *at least seventy* pounds to the square inch—prefers *eighty.*

"I have found by experiment that it is *essential* that a temperature equivalent to seventy pounds *must* be employed."

The *only practical* method of determining the temperature of the liquid is by noting the pressure *on the boiler—testimony of Burgess.*

Accordingly the patentee describes seventy pounds as *synonymous* with 310° Fahrenheit. Again he describes it at seventy to eighty-four pounds. The claim uses the term not less than 310° Fahrenheit, which he has before defined by seventy pounds to the square inch.

The claim of this patent was sustained only against those who went beyond the seventy pounds in New York.

The *process* used by defendants does not come up to the *minimum* claimed by Mellier.

The plaintiffs *do not* use over *sixty* pounds to the square inch.

There is no proof that the defendants infringe either of Keen's boiler patents, that of 1859 or 1863.

Keen's patent of 1859 is for a *combination* of *devices* which is not used by defendants.

His patent of 1863 claims a perforated diaphragm of which *he was* not the inventor. See Martin Nixon's patent, 1853.

Nor was he *first* to use a discharge *pipe* and valve for the purpose of *blowing* out or discharging the contents of the boiler under pressure.

The arrangement of a discharge pipe, with stop-cock, is what everyone using a vertical boiler might use without invention, and is not open to be monopolized by Keen.

The combination of devices in defendants' Dixon's patent has more claim to originality and invention, and does not infringe either of Keen's patents.

The bill ought to be dismissed.

AN APPEAL was taken to the Supreme Court in this case. It

was dismissed because the plaintiffs had become the owners of all the patents in controversy; Justice NELSON stating that the litigation was, therefore, no longer a real one and citing Lord *v.* Veazin, 8 How. 225. (See 8 Wall. 333.)

DISTRICT COURT. MARCH 31, 1866.

ADMIRALTY.

THE BERMUDA.

1. Either spoliation of papers, or falsified destination suffices to induce a legal presumption of hostile ownership.

2. Further proof refused where the destination had been falsified, and papers were, under an apprehension of capture, destroyed in pursuance of previous instructions.

3. The act of Congress of 30th June, 1864, prohibiting a district attorney from acting as separate counsel for the captors in prize cases should not have a restrospective action. Therefore, effect should be given to an arrangement as to fees made with captors previously to the passage of the act; but it may be considered in connection with his official compensation and the latter may be reduced.

PRIZE.

CADWALADER, J.

In this case the only question requiring serious consideration was whether further proof should be allowed. This question was more or less complicated with that of the ultimate destination of the cargo. The affirmance of the decrees condemning the vessel, and the munitions of war which composed part of her cargo, has enabled me to give, without the least difficulty, a decision as to the residue of the cargo consisting of general merchandise. I suspended the final disposition of this part of the case until the decision of the Supreme Court upon the appeal of the claimant of the cannons, because, had further proof been allowed on his part, such proof might possibly have been likewise receivable as to the rest of the cargo. According to my own strong conviction, further proof was altogether inadmissible. But the cannons were, according to his affidavit, to have been landed, at all events, either at Bermuda or at Nassau,

and to have been disposed of on his own account at one of those places, without even a contingent ulterior destination. If this had been true, the rest of the cargo must also, according to the plan of the voyage, have been landed at one of those places, because the cannons were below it, forming part of the ballast of the vessel. They could not have been reached until the merchandise generally had been discharged. I did not consider his affidavit, in this respect, credible. I thought there was no doubt whatever that the destination of the vessel was controlled by those who would certainly have determined it for a blockaded port, if there had been a reasonable probability of running the blockade. If his affidavit were disregarded, the proofs were conclusive that the whole of the cargo was absolutely destined for a blockaded port, either directly or by transhipment. It was at least, clearly shown by these proofs that those who controlled the navigation of the vessel could, if they chose, prevent the landing of any part of the cargo at any intermediate place. The only possibility of doubt, which I thought conceivable in the mind of any person, has been removed by the affirmance of my decree which was founded on the disallowance of further proof on the part of this claimant. Informally he and others had really perhaps been afforded every advantage which could have been derived by them under an express allowance of such proof. During the late hostilities, reasons arising from their peculiar character had induced this court to receive provisionally in the progress of prize cases, almost all evidence which would have been admissible as further proof, except, perhaps, in a very extraordinary case, requiring plenary proofs. Of this practice of the court, parties had in this case availed themselves, and had thus received a benefit to which they were not, in ordinary strictness, entitled. They probably could not have offered any additional evidence under a formal order allowing further proof. To retain the case in this court, seemed, therefore, as to the general merchandise, preferable to a decree of condemnation which would unnecessarily have increased the number of appeals.

The opinion of the Supreme Court would, I think, require of

this court a decree condemning the whole cargo independently of any question of its actual ownership. Such a decree would be conformable to established rules of prize law upon those questions of destination with intended breach of blockade, etc., which the case involves. But the decree may be pronounced, not less properly, upon the question of hostile ownership alone. In the opinion of the Supreme Court, the destruction of the papers relating to the cargo was an unusually aggravated "spoliation," warranting "the most unfavorable inferences as to ownership." The result must of course be condemnation unless further proof can be allowed. To allow it in such a case would set a trap for the conscience of claimants, tempting them to commit perjury, if not inviting its commission. Further proof is not allowable where, as in the present case, the letters of advice and proprietary documents of a cargo have been destroyed under previous orders to do so rather than to let them be seen by captors or boarders. Such was the plain import of the instructions given to the navigator of this vessel by the persons to whom the absolute control of all the shipments had been confided. That these were persons of well known relations hostile to the United States, might alone suffice to exclude any exception or qualification of the rule against allowing further proof in the case of spoliation of papers under such instructions. The only rational exception from such a rule is in cases of well founded apprehension, by persons truly neutral, of danger of illegal detention or capture. If such cases occurred in the wars of the French revolution, it is to be remembered that, so far as proprietary rights of neutrals were concerned, the commissioned belligerents, French and English, who then swarmed the seas, were scarcely less dangerous than pirates. Like danger, though less in degree, may have been reasonably apprehended in some previous European wars. There certainly was no reason for apprehension of any such danger on the voyage in question. In cases of spoliation of papers, the legal presumption against their destroyer is founded in a rule of common sense. The rule is not by any means peculiar to prize courts. Its application is familiar in courts

of equity which administer in this respect the doctrines of general jurisprudence. If the proprietary documents had been preserved they would unquestionably have shown hostile ownership. Direct proof to this effect as to part of the cargo has been furnished by existing papers accidentally discovered in unloading the vessel. As to the rest of the cargo, a moral, not less than a legal, inference to the same effect arises from the destruction of the papers. The moral presumption from the previous orders to destroy them is indeed too strong to be rebuttable.

If this were less clear, condemnation must inevitably result from the wilful falsification of the destination of the cargo. From this the presumption of hostile ownership is, in a case like the present, conclusive. Here likewise, the rule is to disallow further proof. Should the case of any one consignee or shipper be distinguishable, in any respect, under this head, from the general case of the others, there could be no such special difference in his favor as to screen the goods which he claims. If the falsification by those to whom any such party entrusted the goods was unauthorized by him, the law affords him a civil remedy against them to recover an indemnity. But the existence of such a recourse cannot exempt the goods from confiscability. The rule that a person is liable for the wrongful acts of his agents applies, under this head, in the administration of prize law. The principle was applied in this case by the Supreme Court, citing the Ranger, 6 Rob. 126, which was a case of transportation of goods contraband of war. To the same effect is the case of the Mars, (ib. 87, 88,) where the goods were not precisely of this kind, and the decision was upon the ground of a false destination. In a third case, (The Phœnix Insurance Company *v.* Pratt, 2 Binney, 308,) there was no question of either false destination or contraband property of any kind. A neutral who was, for the voyage, the general agent for a cargo principally of neutral ownership, was alleged to have covered in his own name, by false papers, other goods of hostile ownership in the same vessel. The opinion of the court was that the whole property

of the principal on board of the vessel was liable to condemnation, if such an agent attempted to deceive a belligerent by thus covering property of his enemy. Such an act, when perpetrated by the master so as to involve a forfeiture of the vessel, or of goods on board, is within the definition of barratry. (See Earle *v.* Rowcroft, 8 East, 126.) In the present case, those who concocted the falsifications were, so far as they may not themselves have owned the cargo, general agents and managers, in respect of it, for all who were concerned in the voyage. I do not, however, perceive in the case any reason to justify a view so little unfavorable to any one of those on whose behalf the cargo was claimed.

For these reasons, and others which might be stated, the residue of the cargo is condemned. The case does not require the repetition of a remark frequently made, in different forms, in prize courts, that the criterion of hostile ownership is not the same in them as it might be in ordinary tribunals upon a mere question of proprietary right between private persons. A party might be able, in a court of common law, to maintain an action of replevin, or of trover, against a person who, nevertheless, having the commercial control and disposal of the subject of the action, would be deemed the owner in a prize court. A sufficient test of ownership in a prize court is that the goods, on reaching their destination, would have been disposed of, or held, for the profit of persons of hostile residence. Applying this test there can be no doubt that this cargo should be condemned. The previous reasons are however, perhaps, of more simple application to the case.*

* EDITOR'S NOTE.—The first decree in this case condemned the vessel and such part of the cargo as was held to be contraband of war. No written opinion was then delivered—none, at least, has been found. The decree was sustained on appeal by the Supreme Court, Chief Justice Chase delivering the opinion. (See 3 Wallace, 514.) The very elaborate report there made renders further remark unnecessary. But it may be added that except the "General Parkhill," *ante,* Vol. I, p. 479, it was the most important of the prize cases adjudicated in this District. In addition to the value of the principles involved, a reference to the proceedings will show it to be a monument of patient and exhaustive judicial labor. The above opinion

APRIL 3, 1866.

THE JUDGE said:

I have been very much embarrassed in determining upon the proper allowance for the compensation of the late District Attorney, the deceased Mr. Coffey, and upon its apportionment on the shares of the United States and the naval captors respectively of the fund which is distributable. According to the written arrangement made in 1862, between him and the captors, he would have been entitled to two and a half per cent. on the net amount of their share. This would have amounted to about five thousand dollars and would have been wholly deducted from the share of the captors, without any diminution of his official compensation. In other words, he would have received five thousand dollars in addition to his full official compensation. This arrangement cannot be carried into effect. If the act of Congress of 30th June, 1864, had not intervened, and he had survived the final decrees at Washington and here, I am not certain that the arrangement might not have been executed. Such arrangements, it is true, were not to be encouraged. But I am not aware that the objections to them would have been so strong as to render them wholly invalid. I am not quite certain that the Act of June, 1864, would be applicable to a case like the present, occurring after its enactment. This act prohibits the District Attorney from acting as separate counsel for the captors on any private retainer or compensation from them, unless in a question between them and the claimants on a *demand for damages*. There certainly was, in one sense, a demand for damages in this case, though possibly the Act of Congress may be intended as applicable to such a claim of damages as can alone be made after liberation. Upon this point I express no opinion, further than to remark that until the opinion of the Supreme Court that the capture within four and a quarter miles of a neutral shore was not within neutral waters, prudence required that the naval captors should be represented by a vigilant advocate. Till a

appears to have been the last in any of the prize cases; that which follows is in the same case, but on an independent question.

judgment of acquittal I am not aware that any more formal demand of damages than is contained at the close of the claim filed in this case was legally requirable of the claimants. It is not necessary to say more upon these questions, because I am of opinion, that however they might have been decided, the death of Mr. Coffey, at all events, determined his absolute right under the special arrangement in question. But the Act of 30th June, 1864, should not have a retrospective operation. He certainly was the special counsel of the captors. All the services which could be rendered in this district had been performed before his death and before the Act of 30th June, 1864. It is therefore my duty to determine what deduction from the captors' share of the proceeds should properly be made for the account of his estate. In determining this question I ought not judicially to shut my eyes to the arrangement of 1862, because, though it cannot be carried into effect in his favor, it nevertheless operated against him and for the benefit of the captors in precluding him and his representatives from receiving any other than a contingent compensation dependent upon condemnation. Though the stipulated compensation cannot be allowed, I think that the character of the arrangement may, in this respect, be properly considered in estimating the amount of a reasonable allowance. In estimating it, however, a difficulty is presented, which is peculiar to the case. This difficulty is involved in the question whether his *official* compensation, assessable on the *whole* fund should be reduced by reason of his arrangement with the naval captors. After great hesitation I have concluded that such a partial reduction would not be improper, because had the naval captors not been represented by counsel, additional responsibility might have devolved upon him *officially* as representing absent parties in the service of the government. Upon this point I will hear an argument in opposition to my present views if counsel should desire to debate the question. For this purpose the case will remain open. In the meantime, I will state provisionally how, according to my present views, the compensation should be estimated and apportioned. If the arrangement in question

had not been made, I would have allowed to the late District Attorney a compensation of three thousand dollars in addition to the fifteen hundred which has been heretofore paid to the special counsel retained for the United States. This amount of three thousand dollars would, in that case, have been deducted from the whole fund, so that the naval captors would have only borne one-half of it. As the case now stands I will direct that half that amount, say fifteen hundred dollars, be charged against the United States and deducted from their share, and will, in estimating the amount chargeable against the naval captors, take into consideration that this amount would have been deducted from their share if they had not been represented by special counsel. The only difference between this and the other mode of charge will be such as may possibly apply to the question of the late District Attorney's official emoluments under the limitation of their annual amount prescribed by law. I have concluded that in addition to the fifteen hundred dollars thus chargeable against the United States, Mr. Coffey's representative should receive from the share of the naval captors twenty-five hundred dollars, making his whole compensation four thousand dollars. I am not quite sure whether this allowance is quite adequate in view of the great responsibility incurred, as novel and difficult questions were presented in this very interesting case, of which the stages of controversy were unusually numerous. But I have taken into consideration the circumstance that the fifteen hundred dollars paid to special counsel was a charge incurred because the late District Attorney was disabled by illness from attending at some of the stages which have been mentioned, and I have also considered the circumstance that an allowance of five hundred dollars to the present District Attorney is in my opinion reasonable and proper. After all these deductions the nett proceeds will be about four hundred thousand dollars.

The prize commissioners have in this case been taxed unusually by the court for incidental information and assistance for which no specific charges have been rendered. This was the case with both commissioners, but more especially with the

nautical commissioner. He, at my request, made more than twenty charts of straits, sounds, inlets, etc., in different parts of the world as to which questions of capture in alleged neutral waters had previously arisen. I shall direct an additional allowance of one hundred and fifty dollars to the legal prize commissioner and three hundred dollars to the nautical commissioner.

The accounts will be adjusted accordingly, with an understanding that at any time before the final distribution I will hear either the Attorney of the United States or other counsel upon any of the foregoing points of which a reconsideration may be requested. Should no such request be presented, the allowances to the prize commissioners, and late and present District Attorneys, respectively, will be entered as made absolutely.

CIRCUIT COURT. JULY 12, 1866.

EQUITY.

SELTZER *v.* ASBURY.

1. The combination of a rotating pump with a metre to determine the quantity of liquids passing from reservoirs into portable vessels, is new.

2. A use of the essentials of the original combination constitutes an infringement; although new but limited combinations, themselves patentable, may be introduced; and so, also, where, in certain respects, there is an introduction of merely mechanical equivalents.

BILL to restrain infringement of patent.

MOTION for injunction.

Leonard Myers and *J. C. Longstreth*, for complainants.
John C. Clayton, for defendants.

CADWALADER, J.

The first claim in the patent to Kinman, assigned to the complainants, appears to me to have been for the combination of a rotating pump with a metre to determine the quantity of liquids passing from reservoirs into portable vessels. Was this an original invention? And has it been infringed by the de-

fendants? These questions may, I think, be answered affirmatively without contradicting any substantive allegation of the defendant's answer. Were this otherwise, I would by no means entertain the questions in the present stage of the cause.

First, was the invention original? Similar metres may have been used to measure liquids for other purposes than the supply of portable vessels. Moreover, a metre, *without* any pumping arrangement, had been used for the supply of portable vessels. A *reciprocating* pump with a metre had also been used for the purpose.

None of these arrangements included the essentials of the combination in question. I think that it was, for aught that appears, an original combination.

Secondly. Has it been infringed? One of the defendants has, since the application for an injunction in this case, obtained a patent for such a pumping apparatus and metre as they admit that they had been previously using. The specification of the latter patent contains claims of extremely narrow combinations. For these the patent may possibly be valid. Therefore, it may be that the complainants cannot use these improvements or modifications of the original arrangement, without this defendant's license. On that point, I express no opinion. But he may thus have improved upon the original invention, and yet be himself an infractor of their exclusive privilege by using in his arrangement, the essentials of the original combination, or by using an arrangement which differs from it only in the substitution of mechanical equivalents. I am of opinion that this has occurred, and that the defendants have thus infringed.

On security being entered by the complainants in $5,000 to indemnify the defendants if the ultimate decision should be in their favor, an injunction to restrain them till further order from continuing the making and use and sale of such machines as they have been manufacturing should be awarded.

The injunction will, of course, be upon condition that the complainants proceed at law, if the defendants ask it, with such provisions for expediting a trial as may be reasonable.

CIRCUIT COURT. OCTOBER 1, 1866.

EQUITY.

J. ATLEE WHITE *v.* THE COMMONWEALTH NATIONAL BANK.

1. Actions against any association, created under the general banking act of Congress of June 3, 1864, may be brought in the United States courts.

2. An action will lie against a depositary, in the name of the depositor, for goods deposited in his own name, although he was acting for another, there being no express privity of contract between the *cestui que trust* and the depositary.

3. When a bank, in consideration of a depositor keeping his deposit with such bank, receives an article for safe keeping, there is a sufficient consideration to make the special deposit an obligatory contract of bailment.

4. The contract between a bank and a depositor cannot be affected by a by-law of which the depositor has no knowledge.

5. A depositor is, in all cases, entitled to such security (neither less nor greater) as the course of business between him and the depositary shows to have been mutually intended and expected between them.

6. A bailee for hire, who uses due diligence in keeping goods, is not liable if they are stolen.

7. The burden of proof of showing what became of an article received by a depositary, is on the depositary.

8. A bank is responsible for securities delivered to a wrong person by a default, mistake, carelessness, or misconduct of any officer of such bank.

9. Where proper care has been observed in selecting honest and faithful officers, a bank is not responsible for a loss resulting from carelessness not in the course of the officer's business.

This was an action on the case brought by J. Atlee White against the Commonwealth National Bank of Philadelphia for the value of certain bonds and other contents of a box alleged to have been specially deposited by him with the defendants, and to have been lost or stolen by the carelessness or negligence of their employés.

The narr. contained ten counts.

The 1st count charged that in consideration of the plaintiff being a customer of, and dealing with, the defendants as a banking institution, the defendants undertook to receive and safely keep the bonds and other contents of the box. And that in violation of their duty they lost the box and bonds.

The 2d, 3d, 4th, 5th, 6th, 7th, and 8th counts averred generally the deposit of the box with the defendants by the plaintiff and its subsequent loss. The 9th and 10th counts were in trover and conversion.

To this narr. the defendants pleaded not guilty. The case was called for trial October 1st, 1866. Before the jury were sworn the defendants moved to dismiss the suit on the ground that the United States Court had no jurisdiction of the case, the plaintiff being a citizen of Pennsylvania, and the defendants being located in said State. The plaintiff replied that the defendants were a banking association under the Act of Congress of June 3, 1864 (U. S. Statutes at Large, 1864, p. 106), and that the action was sustainable under the 57th section of the law which enacts "That suits, actions, and proceedings against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established." (U. S. Statutes at Large, 1864, p. 122, § 57.) By leave of the court the narr. was amended by inserting the words "established within the district aforesaid" after the words "banking association." The defendants further objected to the constitutionality of the jurisdiction clause in the Banking Act. The court, referring to Osborn *v.* Bank, U. S., 9 Wheat. 738, overruled the objection. A jury was then sworn. The plaintiff presented in substance the following case: That the defendants had received on deposit a closed box belonging to the plaintiff, containing, as he alleged, securities of the public debt of the United States to the amount of $6,520 and some promissory notes; the bonds being investments made by the plaintiff for his widowed sister-in-law from the proceeds of an insurance upon her husband's life. The plaintiff testified in substance that he had been the possessor of two boxes and that both had been deposited with the defendants. Of one of the boxes he had resumed and retained possession. Of the other he resumed possession in the beginning of September, 1865. He alleged that through his agent this box was returned to the possession of the defendants, that when it was afterwards called for, it was

missing, and that it had never been recovered. The defendants denied that the box had been thus returned to them after it went back to the possession of the plaintiff, and proved that there had been no fault on their part, or mistake, carelessness, or misconduct of any of their officers or clerks. The defendants read in evidence a by-law of the bank in the following words: "The bank shall receive and keep, subject to the order of the depositors payable at sight, the cash of all such persons as may be allowed to make deposits therein; and may also receive special deposits of ingots of gold, bars of silver, wrought plate, and other valuable articles of small bulk, at the risk of the depositor."

The plaintiff presented the following points for charge:—

1. "That if the plaintiff was a depositor in the bank of the defendants, and on account of his keeping a deposit there they received the box for safe keeping, there was a sufficient consideration to prevent the contract from being a mere gratuitous bailment."

2. "That if the plaintiff's box was delivered to a wrong person or was lost or mislaid by a default or mistake or by carelessenss or misconduct of any of the officers or clerks of the bank, the bank is responsible for the box."

3. "That the receipt by the defendants of the box having been shown, the burden of proof of showing what became of the box is on the defendants."

The defendants presented the following points for charge:—

1. "That although the plaintiff has been allowed to testify in this case, his credibility is entirely for the jury."

2. "That in weighing his credibility the jury should consider his direct interest in the result, the statements made in court and before the commissioner when his deposition was taken, and all the other evidence."

3. "That a mere depositary without any special undertaking and without reward is not answerable for the loss of goods deposited, but in case of gross negligence which is equivalent to fraud in its effects upon contracts."

4. "That even a bailee for hire or reward will not be liable,

if the goods are stolen, if he show that he used due care in the keeping of them."

5. "That the defendant is not responsible unless for gross negligence, to wit, the omission of that care which the most inattentive and thoughtless never fail to take of their own concerns."

6. "That the plaintiff cannot recover for any property belonging to Mrs. Eldridge."

7. "That the plaintiff cannot recover for the due-bills."

8. "That the verdict should be for the defendants."

The defendants in support of their fifth point presented the following authorities: 4 U. S. Digest Supplement, 241; Foster *v.* Essex Bank, 17 Mass. 500; Edson *v.* Weston, 7 Cow. 278; Sowdowsky *v.* McFarland, 3 Dana, 205; Tompkins *v.* Saltmarsh, 14 S. and R. 275; Mytton *v.* Cock, 2 Strange, 1099.

The defendants also presented the following points and authorities:—

That a bailor who intrusts his goods, knowing how and where the bailee will keep them, assents to such keeping and can maintain no action for their loss. Knowles *v.* A. and St. L. Railroad Co., 38 Maine (3 Heath), 55.

The corporation, and not its officers, are the bailee, and if the cashier fraudulently takes away such deposit the corporation is not liable. 17 Mass. 500.

In support of their fourth point the defendants cited Foster *v.* Essex Bank, 17 Mass. 479.

Samuel C. and *Samuel H. Perkins*, for the plaintiff.
John Clayton and *F. Carroll Brewster*, for the defendants.

The charge of the Court was delivered by

CADWALADER, J.

It appears from the evidence on both sides that the plaintiff was at one time the possessor of two closed boxes, and that both were deposited with the defendants. Of one of the boxes he

resumed and has retained possession. Of the other he resumed possession in the beginning of September, 1865. He alleges that through his agent or messenger, Thomas F. Byrnes, this box was returned to the possession of the defendants, and that, when it was afterward called for, it was missing, and that it has never been recovered. The defendants allege that it was returned to the plaintiff and never came back to their possession. It is agreed that the contents of this box were unknown to them except when it was occasionally opened as the witnesses have explained. The only part of its alleged contents which are now estimated in assessing the damages claimed are the securities for $6,520 of public debt of the United States.

The seventh point on which the defendants' counsel has requested instructions from the Court applies to other subjects, and will therefore not require consideration.

On their sixth point I am requested to instruct you that the plaintiff cannot recover for any property belonging to Mrs. Eldridge. In what relation precisely—whether as trustee or otherwise—he stood towards this lady and other members of her deceased husband's family does not appear. The plaintiff states that the greater part of the securities for the public debt was an investment or reinvestment made by him for her of the proceeds of an insurance upon the husband's life. Between her and the defendants there was no privity of contract. They were strangers to the plaintiff's relations with her, whatever these relations may have been. I think that if, as between himself and the defendants, he represented her interests, the present action may, so far as this objection is concerned, be maintainable upon some of the counts of the declaration. I therefore cannot answer affirmatively the question involved in the defendants' sixth proposition. The controversy will therefore be considered simply as between the plaintiff and the defendants.

The first inquiry will involve points of mere fact. This inquiry is whether the box in question was in truth sent back by the plaintiff and never was returned to him, and whether it contained the securities in question. Here the defendants'

counsel in their first and second propositions requested me to instruct you that although the plaintiff has been allowed to testify in this case, yet his credibility is entirely for your consideration, and that, in weighing his credibility, you should consider his direct interest in the result, the statements made in court and before the commissioner when his deposition was taken, and all the other evidence. These propositions are, of course, correct. Such considerations must be proper wherever parties are, under the recent Act of Congress, admitted as witnesses. In this case, the principal, if not the only testimony as to the contents of the box has been from the plaintiff himself. This testimony should be considered with caution; but, if it is believed by the jury, they will give to it the effect to which they may think it entitled. As to the return of the box to the bank independently of the question of its contents, the evidence of the plaintiff would, if it had stood alone, seem to be altogether contradicted by the testimony of Mr. Depuy, the teller, and Mr. Zeilin, a clerk in the defendants' bank. But here the plaintiff's testimony seems to be strongly confirmed by that of Mr. Byrnes, who is apparently the most reliable of all the witnesses who have been examined. I have no doubt that Mr. Depuy and Mr. Zeilin testify each what he sincerely believes to have occurred. But I cannot doubt that the memory of each of them is, in some respects, defective, and that each of them has testified with rather undue confidence in the accuracy of his own recollection. The same remark applies, I think, with equal, and perhaps greater force, to parts of the testimony of Mr. White, the plaintiff. All three of them seem to have been thus unduly confident on points upon which it is quite impossible to reconcile the whole testimony of any one of them with any probable theory of its complete truth. I do not think that any such remark is justly applicable to the testimony of Mr. Byrnes. He seemed to understand the precise distinction between what he actually recollected, and what he may have, independently of his own recollection, believed. The latter he did not intrude. The former he stated with distinctness. But all these remarks are upon questions of

mere fact which it is for you and not me to decide. Unless you believe that the contents of the box were as the plaintiff states them to have been, and believe that it was not returned to him, your verdict will be for the defendants. But if, in these respects, you believe what he states, it by no means follows that your verdict is to be in his favor. On the contrary, if you fully believe all that he states, the proper decision of the case will depend upon subsequent inquiries of great importance and general interest. In prosecuting these inquiries it will be assumed that the box was never returned to the plaintiff, and that it contained the securities in question.

The propositions which are stated by the plaintiff in his first point and by the defendants in their last point may be considered together. Here the counsel of the plaintiff request me to instruct you that if he was a depositor in the bank of the defendants, and on account of his keeping a deposit there they received the box for safe keeping, there was a sufficient consideration to prevent the contract from being a mere gratuitous bailment.

Upon this point I answer that in the case here assumed there was a sufficient consideration to make the deposit an obligatory contract of bailment. Thus far the contract was not gratuitous, that is to say, was not founded upon insufficient consideration. How far it was, in another sense, gratuitous, or without valuable compensation, that is to say, how far it was a bailment for the exclusive benefit of the depositor, is not of any practical importance except upon the question of the *extent* of the obligation which the bank incurred. This question concerns the degree of care which the defendants were bound to use. The question is thus not that of the obligatoriness of the contract, but that of the proper measure of the obligation incurred. This question is more easily answered when stated in another form. In this form the proposition will be, what is the degree or measure of the *negligence* or *want* of care for which the depositary is liable. This will be considered hereafter.

In the meantime the last point of the defendants will be

considered. Here I am requested to instruct you simply that the verdict should be for them. I cannot so instruct you as matter of mere law, because the question is ultimately to be answered not by me but by you. It may, hereafter, appear that I think your verdict should be for the defendants. If so this will be only the impression upon my mind of the facts in evidence. But upon the effect of the evidence you, and not I, must decide. The request of the defendants' counsel on this point is founded, perhaps, upon their by-law which distinguishes deposits of cash from special deposits. To receive on deposit the cash of a customer may perhaps be considered an essential part of the business of the incorporated banks of the United States. But the receipt of a special deposit, like the deposit here in question, though not an unusual part of their business, may be excluded from it; and when it is not excluded, may be considered as occasional and incidental only, or as wholly collateral to it.

The Legislature of Pennsylvania, in recently incorporating a company with authority to receive such deposits, has enacted that nothing in the charter should authorize the company to engage in the business of banking. So conversely our banks, as they are ordinarily constituted, may refuse altogether to receive such deposits. When received, the business transacted in respect of them is very different from that other business which is included in what may be called ordinary banking operations. This by-law provides accordingly that the bank *shall* receive and keep its *cash* deposits subject to the order of the depositors, payable at sight, and *may* receive *special* deposits *at the risk of the depositor.*

Whether this by-law was admissible in evidence at all, might have been a very doubtful question. On the one hand, the existence of such a regulation might perhaps be supposed to have had some effect in determining the course of business of persons employed in the bank. On the other hand, there is no proof that the plaintiff had any knowledge of the existence of the by-law. Without a knowledge of it, the effect of this contract of deposit made by him could not be influenced by it.

In the actual course of the business of this bank, one of the clerks, and perhaps more than one, appears to have referred all applications to make special deposits to the cashier. But others of them have testified that such deposits were made from time to time by customers of the bank, and were taken backward and forward by the customers who were waited on by either of the tellers, or by clerks not otherwise engaged. The evidence tends to prove that an average number of twenty or more boxes and packages were thus daily in the vault of the bank, and that the course of business in respect of them was generally the same as that pursued as to the plaintiff's boxes. If this was the case, the character and effect of the contract between him and the bank, as to the box in question, were not determined or influenced by the by-law which was unknown to him. If he had known of it, the question of its effect upon the contract might have been one of some nicety. The words "at the risk of the depositor" serve to distinguish special deposits from those ordinary ones of cash which are not, in any respect or degree, at the risk of depositors. The by-law would not reasonably be interpretable so as to absolve the bank from all care. It could not be understood as excusing fraud, or such wilful neglect as would be almost equally bad. How far the definition of culpable negligence might be extended under such a by-law is here unimportant, because the plaintiff was ignorant of its existence. The responsibility of this bank for the special deposit in question is, in this case, the same as if no such by-law existed.

We now approach the question, what is the degree or measure of the negligence or want of care for which such a depositary is liable? On this question the defendants' counsel, in their third and fourth points have stated, perhaps rather too abstractly, certain propositions on which I am requested to instruct you in matter of law. Their fourth point, "that even a bailee for hire or reward will not be liable if the goods are stolen, if he show that he used due care in the keeping of them," is, of course, in the abstract, perfectly true. The third point is, "that a mere depositary, without any special under-

taking and without reward, is not answerable for the loss of goods deposited, but in case of gross negligence which is equivalent to fraud in its effects upon contracts." Before answering this question I will mention the fifth point of the defendants. This involves a similar proposition to the third. The fifth is, however, stated, not abstractly but with a particular application to the case. This proposition is, "that the defendant is not responsible unless for gross negligence, to wit, the omission of that care which the most inattentive and thoughtless never fail to take of their own concerns." These three propositions, the third, fourth, and fifth, are in language which, though copied from that of judicial decisions, cannot be adopted without some qualification. At all events the language must be somewhat qualified in its application to this case. There was no ascertainable valuable compensation to the bank for this receipt or custody of this deposit. If the defendants had received or contracted for any such compensation, they would have been responsible for any want of ordinary care, that is to say, for any want of such care as persons of ordinary diligence and prudence would take of their own interests in a like case. The present was not such a case. The obligation of the defendants was, therefore, *less* than can be measured by the same standard of care. We must, therefore, seek a less elevated standard in defining the degree of care which is required of such a special depositary. In order to find the proper standard, we endeavor to make a corresponding change in defining the degree of negligence for which the depositary is responsible. But here, from the infirmity of language, difficulties are encountered. There is no difficulty in saying that the depositary is liable for gross negligence. We may also say that he is liable only for gross negligence. But here we must qualify this phrase by ascertaining the definition of *gross.* What negligence is *gross?* The language of judges, like that quoted in the propositions of the defendants' counsel, has been criticised by other judges. One English judge, afterwards lord chancellor, said that he could see no difference between negligence and gross negligence; that it was the same

thing, with the addition of a vituperative epithet. This was perhaps going too far on the other side. I will instruct you that the defendants as special depositaries, were liable for gross negligence only. But I qualify the instruction by adding that the measure of responsibility must not be so lax as to authorize the omission of any care which is indispensable to that proper security of the thing deposited, which may be reasonably required according to the usages of men of business. I will add a qualification which may enlarge or diminish the measure of responsibility. This qualification is, I think, of especial importance in this case. The qualification is that the depositor is, in all cases, entitled to such security, neither less nor greater than the course of business between him and the depositary shows to have been mutually intended and expected between them. The application of this remark will be made hereafter.

There are two of the plaintiff's points which in my opinion involve the principal questions of the case—namely, the third point and the second point. I will consider them inversely to the order in which they have been put.

The third point is as follows: "That the receipt by the defendants of the box having been shown, the burden of proof of showing what became of the box is on the defendants." I think this is so; but there arises then the vital question, how are they to relieve themselves from this burden of proof; and what will be the effect if they have so relieved themselves?

There is no difficulty in this case in determining whether defendants have relieved themselves from the burden of proof. They have proved that their cash and assets have not been in excess of what they ought to have been; nor has there been any deficiency; that their officers and clerks were all men of integrity; they have given a complete list of all—president, cashier, all the clerks, messenger, and watchman; they have proved that no depredations occurred, and that no one of these persons was concerned in the abstraction of the box or knows of the box or of its abstraction so far as negatives can be

proved; and that plaintiff had unusual means of knowing how his box was dealt with.

If this be so, it is for you to say whether the burden of proof cast upon a depositary can ever be met, if it has not been met in this case; and whether, if you say it has not been met in this case, you do not turn the depositary into an insurer.

Such care was taken of the box in this case as was consistent with the use the depositor wished to make of it; he wished to take it backwards and forwards.

Agreeing as I do that the burden of proof in this case is cast upon the depositary, I leave it for you to say, whether there can be conceived a case where the depositary has more conclusively relieved himself of the burden of proof if a negative can ever be proved.

If any one of the employees of the bank had been dead, it might have embarrassed us; but all are alive and called as witnesses.

I don't put it as a matter of law, but as a question of reason in a business point of view; if you never allow a depositary to relieve himself of responsibility but by the production and redelivery of the deposit, you make him an insurer.

The only point which seems to me to remain, in order that this whole subject may be exhausted, is the inquiry, whether there may not be an uncertainty that the box has been lost or mislaid.

If then the defendants have relieved themselves of the burden of proof, I will come to the plaintiff's second point, namely, "That if the plaintiff's box was delivered to a wrong person, or was lost or mislaid by a default or mistake, or by the carlessness or misconduct of any of the officers or clerks of the bank, the bank is responsible for the box and its contents."

I instruct the jury as requested by the plaintiff on this point, with this qualification, that if the mistake, accident, carelessness, or misconduct was not in the course of the business of the officers or clerks, and proper care had been observed in

selecting honest and faithful clerks and officers, and the defendants have relieved themselves in all other respects of the burden of proof cast on them, as is stated under the defendants' third head, the defendants are not responsible.

It is expressly decided in the case of Foster *v.* The Essex Bank, 17 Mass. Rep. 479, where there was an embezzlement by the cashier of the bank of a portion of a special deposit of gold coin. And Judge Story, in his Commentary on Bailments, remarking upon this case, states that the court decided that the responsibility of the bank was the same as if the theft had been committed by a stranger; for there was no want of diligence on its part in selecting proper officers, and the act of embezzlement was not within the scope of the duty of the cashier as agent of the corporation.

So far as the conjecture, for it is nothing more, is concerned, that the box might have been lost or mislaid, you see that unless it was a mistake or misconduct of the officers in the course of their business as officers of the bank, or unless there was some fault traceable to the corporation, this point must be answered in the negative.

You are sworn to decide according to the evidence; and if you believe that the defendants have relieved themselves of every burden of proof which could be reasonably required of them, and there remains no evidence to show fault on their part, or mistake or carelessness or misconduct of any of their officers or clerks, your verdict must be for the defendants.

For myself I cannot see—though it is entirely for you—anything in the evidence in this case which will justify a verdict for the plaintiff.

The plaintiff thereupon suffered a non-suit.

CIRCUIT COURT. NOVEMBER 19, 1866.

EQUITY.

CHASE & COMPANY *v.* M. WALKER & SONS.

Local privileges were assigned by a patentee. In the instrument of assignment it was agreed, (1) that they should be for the utmost and fullest extent as to duration that the patentee is or may be entitled to under the letters patent; (2) that the patentee should assign the same local privileges on any further patent or patent rights which he may afterwards procure upon the original invention, and also any and all renewals thereof: *Held,* that these provisions construed together conferred a clear interest in the assignee to all future extensions.

Bill to restrain infringement of patent.

Hearing on bill and answer.

The bill was filed by the original patentee against the assignee of an interest for the State of Pennsylvania. Its purpose was to restrain the exercise of the privileges granted from and after the expiration of the original term of fourteen years. The instrument of assignment contained an agreement providing *inter alia* for the duration of the privileges, and the question turned upon the construction to be given to its clauses. The subjects of the patent were certain improvements in the manufacture of steel and iron wire railings, screens, etc.

Leonard Myers and *J. C. Longstreth,* for complainants.
George Harding, for defendants.

CADWALADER, J.

It is Judge GRIER's opinion, in which I concur, that this is a very clear case for the defendants.

As the proceeding is in equity it is immaterial whether the instrument of 20th January, 1849, vested a legal or an equitable interest in the local privilege which it was intended to transfer.

The question is whether this instrument sufficiently indicates an intention to transfer an interest which *might* endure

beyond the original term of fourteen years. If such intention is, in any wise, apparent, the effect must be to transfer the local interest for the term of the extension of seven years afterwards obtained. The question may be resolved by considering two clauses of the instrument. They will be considered separately, and afterwards together.

In the first, the patentee grants the exclusive local privilege to the *utmost and fullest* extent as to *duration* that he is, or *may be*, entitled to *under the letters patent.* If the words "under the said letters patent" had been omitted, the effect of this clause could scarcely have been questionable. Independently of the contingency of an extension, the term could be neither less nor greater than the original fourteen years. Therefore, independently of this contingency, there could be no such *comparative* duration as to satisfy the words "*utmost and fullest* extent." The applicability of this remark is not excluded by the addition of the words "under the said letters patent." In the reports of cases which have been cited in the argument, the original patent is, after an extension, considered as having been from the first, for certain purposes, a patent for the extended term. What is in one part of the Act of Congress called an *extension* is, indeed, in another part of the act, called a *renewal* of the patent. But the practice of the patent office, prescribed expressly by the act, is not to issue a new patent, but merely to certify the extension upon the original patent.

In the second clause, the patentee covenants to assign any further patents, or patent rights, which he may, at any time *afterwards*, procure for any *improvement* or *improvements* upon the original invention, and also any and all renewals thereof in and for the said State. Independently of the arguments upon the context of this clause, and upon the different meanings which may be attributable to the word *renewals*, the substance of the provision for the transfer of *subsequent* patents for improvements must be considered. Any such subsequent patent would be for a term of fourteen years which, whether it should be extended or not, must necessarily continue after

the expiration of the term of the former patent for the original invention. Now the patentee cannot be understood as having intended either to deprive himself of the right of applying for an extension of the original patent, or to reserve this right so as to frustrate the subsequent local use of the patented improvements, under the transfer in question. But the subsequently patented improvements could not be used without the use of the original invention; and the parties cannot have intended that as to such improvements he should be able to restrain the use of the original invention after the expiration of the original term. There was thus one purpose at least for which the local privilege must have extended beyond the original term.

Lastly, the two clauses will be considered together. Here the second, as a glossary to define the words of the first, will remove any doubt which might otherwise remain as to their import. The words of the first clause "utmost and fullest extent as to duration" are shown by the second clause to have extended, for a specific purpose, beyond the original term of fourteen years. If so, as the words of the first clause are not specific but general, their intended application, as to the local privilege transferred must have been the same for general purposes, including the extension in question.

Notwithstanding the decree under which the bill was taken *pro confesso*, the cause was heard, by consent, as upon bill and answer. Moreover, the documents under which the parties respectively deduce title were, by consent, read in evidence at the hearing.

The decree must be opened and set aside, and the bill dismissed with costs.

DISTRICT COURT. DECEMBER 1, 1866.

INTERNAL REVENUE.

THE UNITED STATES *v.* McVEY.

1. An official paper, issued under the authority of an Act of Congress, in the form of a license to carry on a certain business, viz.: the distilling of spirituous liquors, for a year, or until the end of a current year, upon the payment of a certain tax or duty, takes effect, not as the grant of a license, or privilege, or exemption, but only as a receipt for the tax or voucher of its payment.

2. It is within the power of Congress, by a subsequent enactment, operating prospectively, to increase the amount of such annual tax for the unexpired part of the current year; but

3. An Act of Congress increasing the annual tax, will not be interpreted as increasing it before the end of the current year, unless the words of the act necessarily require the imputation of such an intention.

4. It seems that the provisions of the Internal Revenue Act of 13th July, 1866, which increase the previous annual tax or duty on certain occupations, apply so as to increase it for the periods between the respective times when the act took effect, and the end of the current year on 1st May, 1867; but,

5. Until after a reassessment, a person who has for the current year paid the annual tax or duty previously imposed, cannot, under this act, become indictable for nonpayment of the amount of the increase.

6. Review of internal revenue legislation.

INDICTMENT under Act of Congress of 13th July, 1866, for non-payment of increase of annual tax on the business of distilling spirituous liquors. Owing to the numerous cases in which the same questions arose, the decision was of great practical importance.

STATEMENT.

The revisory and amendatory Internal Revenue Act of 13th July, 1866 (14 Ll. U. S., pp. 98-173), repealed all previous enactments inconsistent with it, and provided that all former acts should be in force for collecting all taxes, duties, and licenses assessed or assessable, the right to which had accrued, or might therefore accrue, under those acts; and that where any act was, by this law, repealed,

no duty imposed by any such former act should be held to cease in consequence of the repeal until the respective corresponding provisions of this law should take effect. It took effect, except as otherwise provided, on 1st of August, 1866; and so far as it changed the existing law as to distilled spirits and fermented liquors, took effect on 1st of September, 1866 (pp. 173, 1682). The Principal former Internal Revenue Laws in force at the time of its enactment were the act of 30th of June, 1864, (13 Ll, U. S. 223) and the amendatory act of 3d of March, 1865 (ib., p. 469). The mode of amendment of many of their sections by the act of 1866, was to strike out all after the respective enacting clauses, and substitute enactments in some respects the same or similar; in others more or less different. In many such enactments, the only difference consisted in a mere adaptation of the phraseology to verbal or substantial differences, introduced by amendments of other sections. But some sections of the former acts were simply repealed, and new enactments substituted.

The annual taxation of the business of persons engaged in certain trades, occupations, or professions, was commenced under the Internal Revenue Law of 1st of July, 1862 (12 Ll. U. S. 453) was in part, newly regulated by the amendatory act of 3d March, 1863, § 15 (ib., p. 724) and was revised and continued by the acts of 1864 and 1865. The legislation thus prior to the act of 1866 had required every such person to pay for and obtain yearly a license to carry on his business until the next succeeding 1st of May.

An amendatory purpose of the law of 1866 fully carried into effect by its enactments, was to expunge from this former legislation the word *license* wherever it had occurred, and to substitute for it everywhere the phrase *special tax*. The leading enactment under this head (14 Ll. U. S., 113) substitutes for the enactments of section 71 of the act of 1864 the words, "No person, firm, company, or corporation, shall be engaged in, prosecute, or carry on any trade, business, or profession, hereinafter mentioned and described, until he or they shall have paid a special tax therefor *in the manner hereinafter pro-*

vided." This was a literal re-enactment of the former law, except that the words "*paid a special tax*" are inserted in place of the words "obtained a license." The seventy-third section of the act of 1864 (13 Ll. U. S. 249) had enacted that if any person should exercise or carry on any trade, business, or profession, or do any act thereinafter mentioned for the exercising, carrying on, or doing of which a license was by that act required without taking out such a license, *as in that behalf required*, he should, for every such offense, besides being liable to the payment of the tax, be criminally punishable in the manner prescribed. The act of 1866 (14 Ll. U. S. 113) has amended that section by striking out all after the enacting clause and substituting an enactment imposing the same punishment upon "any one who shall exercise or carry on any trade, business, or profession, or do any act thereinafter mentioned for the exercising, carrying on, or doing of which a *special act* is imposed by law without payment thereof, *as in that behalf required.*"

The details of the legislation as to the subjects and amounts of the *annual* tax were contained in the seventy-ninth section of the law of 1864 (13 Ll. U. S. 251), which enacted that there should be paid *annually for each license* the sums respectively stated under distinct heads, in paragraphs numbered 1 to 49, inclusive. By the act of 1865 (ib. 473) the whole of the 49th paragraph was struck out, and four new paragraphs, numbered 49 to 52, were substituted. The act of 1866 (14 Ll. U. S. 115) amended the seventy-ninth section of the act of 1864 by striking out all after the enacting clause, and substituting words imposing a *special tax* on the respective subjects of fifty-one paragraphs. The paragraphs numbered 1 to 50, inclusive, coincide, as to numeration and subjects, with those of the act of 1864, as amended by that of 1865; and, besides the substitution of the phrase *special tax* for the word *license*, include a revision of the successive paragraphs which are, in some respects, altered and modified. In most cases the annual amounts of the tax were unchanged. But there were certain reductions and certain increases. Thus the

act of 1864 had provided that photographers, according to a graduation of their annual receipts, should pay $10, $15, or $25; and that builders and contractors should pay $25, and if their contracts in any one year should exceed $25,000, an additional dollar on every $1,000 of the excess. By the act of 1866 photographers pay, in all cases alike, $10; and builders and contractors do not, in any case, pay more than $10. In the cases of proprietors of *gift enterprises*, and of *brewers*, and of *distillers*, the annual tax is increased by the act of 1866. On the business of proprietors of gift enterprises, the tax is trebled. It is doubled on that of brewers. Distillers, under the act of 1864, paid $50, or if they distilled less than 300 barrels in a year, $25; and a distiller of apples, grapes, and peaches distilling less than 150 barrels, paid only $12.50. Under the act of 1866 (14 Ll. U. S. 117) distillers are to pay $100; distillers of apples, grapes or peaches, distilling 50 and less than 150 barrels in a year, $50; and those distilling less than 50 barrels, $20. Moreover the 51st paragraph of this act (p. 122) imposes on grinders of coffee or spices an entirely new annual tax of $100.

The act contains no distinct specific provisions applicable to such grinders, or to proprietors of gift enterprises, but contains numerous provisions of specific applicability to distillers and to brewers, respectively.* The twenty-third section (14 Ll. U. S., 153) enacts that "If any person shall carry on the business of a distiller, or rectifier, without having paid the special tax *as required by law*, he shall, for every such offense, be liable to a fine specially prescribed and imprisoned.

In the present case the indictment is upon the last of these enactments. The defendant is a distiller, who has been engaged in this business from a period anterior to the enactment of the law of 13th July, 1866. Before its enactment he obtained a license, under the act of 1864, to carry on his business until 1st May, 1867, having first paid the proper annual tax or duty under the act of 1864. Since the act of 13th July last took

* Most of these provisions apply to what is called, in the opinion of the Court, the *police* of the internal revenue system.

effect, he has continued the business without making any further payment. This act having increased the annual tax which had been payable under the law in force when he obtained his license, this prosecution was instituted against him for not paying the amount of increase for that part of the current year between 1st September last, when the new law took effect, and 1st May next. On the trial there was no proof that he had been *reassessed* for that amount.

The law of 1864, § 74 (13 Ll. U. S. 249), enacted that all licenses granted after the 1st of May in any year should continue in force until the 1st of May next succeeding, and should be issued upon the payment of a ratable proportion of the whole amount of duty imposed for such license; and that each license so granted should be dated on the first day of the month in which the liability therefor accrued. For these provisions the act of 1866 (14 Ll. U. S. 114) substitutes the words, "All such *special taxes shall become due on the first day of May in each year, or on commencing any trade, business, or profession* upon which such tax is by law imposed. In the former case the tax shall be *reckoned for one year*, and, in the latter case, proportionately for that part of the year from the first day of the month in which the liability to a special tax commenced, to the first day of May following."

The enactments which will be lastly mentioned are those of the eightieth section of the act of 1864, as they are amended and supplied by the act of 1866. The previous act of 1862, § 65 (12 Ll. U. S. 459), had conferred a very extended authority upon the Commissioner of Internal Revenue to regulate the ascertainment or estimation of the annual sales or receipts in cases of all kinds in which the rate of the annual license was graduated by the amount of sales or receipts.

A similar authority was conferred on him by the eightieth section of the act of 1864 (13 Ll. U. S., 257), with an added context in the words: "and where the amount of the license, or the rate, *has been increased, or is liable to be increased* BY LAW above the amount of *any existing license* to any person, firm or company, or has been *understated or underestimated*,

such person, firm or company shall be *again assessed*, and pay the amount of such *increase*, which shall be endorsed on the original license, which shall thereafter be held good and sufficient." The act of 1866 (14 Ll. U. S. 122) confers a similarly extended authority upon the Commissioner, and substitutes the following context: "and where the amount of the tax has been *increased by law* above the amount paid by any person, firm, or company, or has been *understated or underestimated*, such person, firm or company shall be *again assessed* and *pay the amount of such increase*. *Provided*, that when any person, before the passage of this act, has been assessed for a license, the amount thus assessed being equal to the tax herein imposed for the business covered by such license, no special tax shall be assessed until the expiration of the period for which such license was assessed."*

At the trial during the present term, a verdict of guilty was found, by agreement, subject to the opinion of the Court, whether the case was a proper one for conviction. The case having been argued on the point thus reserved, the following opinion was delivered by the Court:

CADWALADER, J.

The questions are: 1. Whether the provisions of the act of 13th July, 1866, which increase the annual tax or duty on the business of distilling spirituous liquors apply to the period between the 1st of September last and 1st of May next; and,

*The concluding proviso does not apply to the present case; and therefore is not mentioned in the opinion of the Court. The application of this proviso may be exemplified in the case of a builder and contractor, or in that of a photographer. Thus, a photographer who, in consequence of his annual receipts having been underestimated, had paid only $10, might, under the act of 1864, have been liable to a reassessment requiring him to pay $15 or $25; but the annual duty or tax having by the act of 1866 been made ten dollars on the business of all photographers alike this proviso relieves him from liability to reassessment for the former deficiency.

Therefore, the only part of the enactment which can apply to the case is that part which next precedes the concluding proviso.

if so, then, 2. Whether mere non-payment of the amount of the increase, where no reassessment has been made, is an indictable offense under the act.

1. By the act of 1866, the annual payment of a *special tax* is required wherever persons had, by the previous legislation, been required to pay for and obtain annual *licenses*. The difference, though, in a certain sense, only verbal, and though practically it may be unimportant, is doctrinally very important. The Constitution gives to Congress power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, but no power to regulate the purely internal commerce of a State. Congress had neither power to prohibit nor power to license the prosecution of any trade or business *within* a State. The so-called license under the former legislation was, therefore, of no effect as a license. It took effect only as an official receipt or voucher for the payment of the annual tax or duty. This duty or tax Congress had, however, the full constitutional power to impose. The word *license* was a misnomer. This was practically unimportant, because a mistake in the *name* of a thing is never of legal importance where the substance of the thing is not legally uncertain; that is to say, not unascertainable. Here the purpose of Congress was to impose a lawful annual tax. It is called by its right name in the act of 1866.

The doctrinal importance of this legislative correction of the misnomer is exemplified in the former legislative perplexities which the mistake had engendered. These perplexities were apparent in precautionary provisions of the act of 1862, guarding against implications, that the act was intended to interfere with, or to create exemptions from State legislation taxing or prohibiting any business for which Congress required the yearly licenses to be obtained. The precautionary enactments were amplified in the act of 1864, with an additional provision that no law of a State, authorizing or prohibiting any trade, business, or profession, should exempt a person carrying it on from the operation of the act of Congress.*

* The provision of the act of 1862, § 67 (12 Ll. U. S., 459), was that

If the correct language of the act of 1866, designating the duty as a *tax*, had been used from the first, all such provisions might have been omitted. But though the misnomer alone had occasioned their introduction, yet, as they were contained in the former act, their entire omission from the act of 1866 might, perhaps, have induced popular misconception. They have therefore, in part, been cautionarily retained in this act (14 Ll. U. S., pp. 115 and 122).

It is contended for the defendant that in the case of a license granted under the existing authority of an act of Congress to carry on a certain business for a year, on payment of a certain tax or duty, Congress cannot afterwards constitutionally increase the tax for any part of such year. This argument is founded upon a two-fold misconception. First: If Congress had power to license the trade or business for a year, and if the license could, therefore, have been deemed a contract between the United States and the tax-payer, there would be no consequent disability in Congress to abrogate the contract by increas-

no license should be construed to authorize the commencement or continuance of any trade, business, or employment within any State or Territory by whose laws it was, or should be, specially prohibited, or in violation of her laws, and that nothing in the act should be construed so as to prevent the several States within their limits from placing a duty, tax, or license, for State purposes, on any business matter or thing on which a duty, tax, or license was required to be paid by the act. The provision of the act of 1864, § 78 (13 Ll. U. S., 250) was that no such license should be held, or construed, to exempt any person carrying on the trade, business, or profession specified in the license from any penalty or punishment provided by the laws of any State for carrying on such trade, business, or profession within such State, or in any manner to authorize the commencement or continuance of such trade, business, or profession contrary to the laws of such State, or in places prohibited by municipal law; and that no such licence should be held or construed to prevent or prohibit any State from placing a duty or tax for State or other purposes on any trade, business, or profession for which a license was required by the act. The additional provision of this act was that no person carrying on any trade, business, or profession for which a license was required by the act should be exempted from procuring such license, or from any penalty or punishment imposed by the act, by or in consequence of any State law either authorizing or prohibiting such trade, business or profession. This additional provision is not reenacted by the law of 1866.

ing the tax during the year. The Constitution provides that *no State* shall pass any law impairing the obligation of contracts; but imposes no such prohibition upon the legislature of the United States. The powers of Congress, conferred by the Constitution, must not be exceeded. But they may be abused, as may all governmental powers, whether executive, legislative, or judicial. The abuse of executive or judicial power, where its exercise is not otherwise revisable, may be redressed by impeachment. But there can be neither redress nor revision of an abuse of legislative power where its limits are not transcended. Secondly, we have already seen that the so-called license was misnamed. The transaction which it attested was the mere payment of a tax. Now, Congress can as lawfully increase an *annual* tax as increase any other tax, or as impose a new one. The argument, therefore, cannot prevail.

But the rejection of it implies no exclusion of the argument that Congress, after having authorized and required the formality of the annual license, cannot reasonably be supposed to have *intended* to increase the tax for any part of the current year. The latter argument presents, not the same question in another form, but a question altogether different. The perplexities in legislation which, as we have seen, were during four years, consequent upon the legislative misnomer, and the various cautionary provisions in the acts of Congress, founded on the assumption that the so-called license was an effectual one, suggest that Congress, in correcting its own misnomer cannot have been regardless of the probability that private citizens paying the annual duty would suppose themselves the holders, not of a mere voucher, but of the grant of a privilege of exemption from further taxation during the year. It is true, as a general proposition, that every man is bound, and is presumed, to know the law, and that ignorance of it is no excuse for its violation. But this does not answer the argument on the question of probable legislative *intention;* and it certainly seems highly improbable that Congress can have intended to increase the annual tax before the end of the current year. That there was no extraordinary emergency

requiring such an immediate increase for the public interest may be inferred from some of the enactments of this law, and from its title, which is "An act to reduce internal taxation and to amend" the former laws on the subject. The argument is, however, at most, one of probable intention only; and the presumption of such intention may, of course, be encountered and rebutted by the express language of the law.

In support of the prosecution, it has been said that the act increases the tax and takes effect from a certain time, and that the words thus require the increase to take effect from this time. The act applies to various other subjects, in such a manner as might satisfy the enactments as to the time when it shall take effect. This, however, might not suffice to exclude the increase in question if no special words applying to it were found elsewhere in the act. But it must be recollected that the act substitutes for a part of section 74 of the former act the following words, applicable to all annual taxes, viz.: "*All such special taxes* shall *become due on the first day of May* in each year, or *on commencing* any trade, business, or profession upon which such tax is by law imposed. In the former case, the tax shall be *reckoned for one year*, and, in the latter case, proportionately for that part of the year from the first day of the month in which the liability to a special tax commenced to the first day of May following. (14 Ll. U. S. 114.) Under these words all annual taxes from the time when the act took effect would seem to be included in two classes only: *the first*, those for an *entire year from every future* 1st of *May;* the *second*, those up a business *commenced* after the 1st of May in a current year. The present case unquestionably is of neither class. If the argument rested here, the case must therefore be decided for the defendant.

The decision of the present question must be the same as if the case had been that of the proprietor of a gift enterprise. The act has trebled the former annual tax upon such a person's business. This business is mentioned because it is the subject of no *special* regulations of what may be called the *police* of the internal revenue system. All the special regulations of

this kind as to distillers and brewers which are contained in this and the former acts may, therefore, be dismissed from consideration. These provisions are intended as precautions against fraud or evasion. They are incidental and auxiliary to securing and collecting the taxes upon the *products* of the business of distillers and brewers in a much greater degree than the specific *annual* taxes upon their business. These regulations of the police would not have been mentioned at all if they had not been discussed in the argument. I do not perceive their applicability to the question.

An argument for the prosecution has been urged upon certain general words of enactment in different parts of the Internal Revenue Laws, particularly the enactments which the law of 1866 substitutes for §§ 71 and 73 of the former law, and the enactment of § 23 of the act of 1866, on which the present indictment is framed. The argument is that these enactments expressly prohibit and make indictable the mere act of carrying on a business upon which a special tax is payable—and especially the business of a distiller or a brewer—without having paid the tax. It is contended that the enactments are unrestrictively expressed, and should operate from the respective times when the law takes effect. But for the purposes of the present question the phraseology is nowhere so unqualified as the argument requires that it should be. Thus under the amendent of the 71st section of the former act there is no default without a failure to pay *in the manner required.* Under the amendment of the 73d section of the former act there is no criminal infraction without a failure to pay *as in that behalf required;* and under the enactment on which the indictment is framed a like effect must be attributable to the words "*as required by law.*" Therefore the argument upon every one of the enactments begs the very question which is to be determined. How far the words of the several enactments will be of general or unrestricted applicability after the termination of the current year is not the present question. That they, in the meantime, leave this question open for consideration is all that need be said here.

The question must be decided upon the effect of the words which in the act of 1866 are substituted for those of § 80 of the act of 1864. The words to be particularly considered are these: "Where the amount of tax has been *increased by law*, above the amount paid by any person, firm, or company, or has been *understated or underestimated*, such person, firm, or company shall be *again assessed, and pay the amount of such increase.*" The context shows indisputably that the word tax here means *annual tax.*

With reference to the words "*understated or underestimated,*" it may be remarked that where the successive Internal Revenue Laws have imposed a yearly tax or duty upon certain occupations of which the products or avails have also been taxed, the assessment of such yearly tax (formerly called the *license duty,* now called the *special tax)* has always been kept, by these laws, distinct from the assessment of the tax upon the products of avails. Nevertheless, upon occupations of certain kinds, the *annual* tax has been so graduated and rated as to differ in amount with differences in the annual products, or annual sales, or annual receipts. The consequence has been, as it must continue to be, that the rate of assessment for the *annual* tax on a business of a certain kind may be increased, or may become liable to be increased, in the course of any year, without any legislation to change the amount of such tax during such current year. The annual tax being always properly payable *in advance*, must, in every *such* case of *increase* during a year, have previously been either *understated* or *underestimated.* These words *understated* or *underestimated* seem to include every possible case in which a new or corrected assessment of a *yearly* tax can be required, except where its amount has been increased by new legislation.

Then what is the proper application of the words *increased by law?* These words, if the additional disjunctive words, *understated or underestimated*, had been omitted, might possibly have been understood as having a meaning similar to that of these latter words. But as both sets of words are disjunctively used, different meanings must be attributed to them. This is

not one of those cases in which the word *or* in a statute may be understood conjunctively. The two sets of words, having thus different meanings, the words *understated or underestimated*, unless there be a mistake in the foregoing remarks upon them, include under the act every possible increase of the annual taxation during any current year, except increase of it by new legislation. If so, the words *increased by law* cannot have any other applicability than to an increase for a *fraction of a year* by *legislation*.

Consequently, as at present advised, I think that Congress must have intended to increase the tax in question for that part of the current year between September 1, 1866, and May 1, 1867. I would have been of a different opinion if I could have discovered any other possible reasonable application of the words *increased by law* in the context in which they stand. As this case may, however, be determined, for the present, upon the second question, and as the first may again arise in other cases, it will not be considered as definitely decided. This will afford counsel an opportunity to make any new suggestion that may occur to their minds upon the application of the words in this part of the statute.

The second question is, whether, assuming the annual tax to have been legislatively increased for the fraction of the current year, the prosecution could be sustained without proof that there had been a reassessment. The argument for the prosecution is that for the purpose of putting a delinquent in default, the statute is in itself an assessment, or equivalent to an assessment, of the annual tax, and that he should pay it of his own accord, or incur the peril of conviction of *crime*. The effect of this would be that every person in the United States who, under any of the fifty-one heads of the statute, may become liable on the 1st of May next to pay an annual tax upon a business of any kind whatever, will, on the very next day, the 2d of May, whether assessed or not, be liable, not only to payment of the tax, but also to immediate criminal prosecution, without excuse, or exemption from fine and imprisonment. It is not necessary to express an opinion whether

hereafter, for the next, or any subsequent year beginning on the 1st of May, there can thus be an indictable default without previous assessment. For the decision of the present case, it suffices that the enactment which increases the tax for the fraction of this current year expressly provides that the person "shall be again assessed and pay the amount of such increase." Under these words, there certainly can be no indictable default until after a reassessment. Whether upon a reassessment, every omission to pay the amount of increase—even though not a wilful omission—becomes indictable *immediately*, without any possible exemption, and without the admissibility of any excuse whatever, is a question which I have not, as yet, had occasion fully to consider.

In this case there will be a new trial on the point reserved.

CIRCUIT COURT. JANUARY 7, 1867.

INTERNAL REVENUE.

DOUGHERTY *v.* ALLEN, ASSESSOR, AND ZULICK, COLLECTOR.

Practice as to issue to determine facts under bill to restrain proceedings under the internal revenue acts.

BILL IN EQUITY to restrain assessment, levy of tax, and forfeiture as for liability under the internal revenue laws.

The plaintiffs were manufacturers under a patented invention of their own, of brewing fluid, involving a process of distillation combined with other processes and the use of materials not used in the distillation of spirits. They claimed they were not within the provisions of the act of June 30, 1864, and its amendments, and were not, therefore, subject to assessment tax and forfeiture as insisted upon and threatened by the defendants. Pending the hearing upon the injunction the Court made the following order:

CADWALADER, J.

The Court having considered the affidavits and admissions at the several interlocutory hearings upon the application for an injunction, is of opinion that sufficient reason has been shown for awarding such an injunction as will suspend proceedings on the part of the local officers of the internal revenue service in order that the question hereinafter stated may be speedily determined in an action at law. The injunction for this purpose prayed in the bill is, therefore, awarded against the defendants to remain in force until further order, upon condition that on the filing, upon the law side of the Court, of a declaration in debt at the suit of the United States against the complainants or either of them for non-payment of any duty alleged to be due by him or them on distilled spirits, as of any past or present term, he or they shall forthwith appear thereto and plead that he or they is or are not indebted in manner and form therein alleged, and shall file with such plea an agreement that under the issue thus tendered the question triable shall be whether he has manufactured distilled spirits, and that for obtaining a jury to try such issue a writ of *venire facias* at his or their cost may forthwith issue and may be executed in the manner prescribed by the rule of the District Court of the district as to special writs of *venire facias*. And either party shall be at liberty to apply at any time or times to this Court for directions to speed or regulate the trial or for any other necessary and proper purpose. It is further provided that the proper local officers of the internal revenue service may at all convenient times enter the premises of the complainants for all necessary and proper purposes of inspection of the process of manufacture, etc.

DISTRICT COURT. MARCH 8, 1867.

INTERNAL REVENUE.

IN RE EIGHTY-ONE BOXES OF CIGARS, ETC., LATELY IN THE POSSESSION OF JACOB NICHOLS.

In a sale of goods forfeited, the tare, by mistake, was not deducted, and the purchaser was required to pay for gross and not for nett weight. He was permitted to receive back the difference. The case was peculiar and is not a precedent.

INFORMATION against goods subject to duties under the internal revenue law of June 30, 1864, charging fraudulent sale and removal.

PETITION by purchaser at sale to recover back the amount paid, by mistake, for tare.

CADWALADER, J.

This case is altogether peculiar—I may say, singular. The decision will not be a precedent for any case that can probably occur hereafter.

The sale by the marshal was by weight, which was intended and understood by dealers in the article to be nett weight; and such dealers, according to the evidence, cannot have been mistaken as to the capacity of the packages. Through a mistake which the district-attorney and marshal admit to have been made, and concur in desiring to correct, the tare was not deducted, and the purchaser was required to pay for gross instead of net weight; and did so. He is not a dealer in the article. Had he been, the mistake would not have occurred; or would have been corrected before payment of the price. The delay in his application consequent upon delay in discovering the error has been explained satisfactorily. To grant his petition will, therefore, not be a precedent contrary to the rule that in judicial sales matters of this kind are at the buyer's risk.

A former case in which I corrected a similar error in the

price of a sale by quantity differed from this case inasmuch as *there* the buyer offered to give up the purchase.

Here it is, for reasons which have been established by proof, impossible for him to do so. But as it has been shown that the full market price, tare off, has been paid, this otherwise objectionable peculiarity of the case may be disregarded.

The petition is granted.

DISTRICT COURT. MARCH 13, 1867.

ADMIRALTY.

WEIDNER *v.* THE JANE J. SOUTHARD.

In cases of alleged purpresture, the Court will not pass upon the question collaterally in a salvage claim for wharfage, in the absence of any proceeding at the suit of the United States.

LIBEL for salvage.

CADWALADER, J.

This was the case of a vessel from Liverpool destined to Philadelphia icebound at Chester.

The claim of the libellant is, in effect, to charge full wharfage for all vessels which, in time of danger, use the piers of the United States at Chester, and require such an attachment to his intermediate wharf as many of them cannot but occasionally require.

Before the construction of his wharf, there were established fixtures which had, for a long time, been used on the river front for such intermediate attachment. The use of these ıres had been gratuitous. They had been thus used with titude of extension with which, as to vessels in certain sional positions the projection of the libellant's wharf may e or less interfere.

he argument for the respondent is that the wharf was an

unlawful construction as against the United States, and that consequently the assessment of the charge in question upon vessels using the pier is an extortion which ought not to be permitted. The wharf was apparently made under the authority of the wardens according to the laws of the State of Pennsylvania; and is therefore apparently a lawful structure except as against the United States. It may nevertheless be a purpresture as against the United States. If so, a court of equity might, in a proceeding at the suit of the United States, enjoin the libellant from collecting wharfage from vessels in distress using the Chester piers, or might otherwise prevent the projection of the wharf from impeding the gratuitous use by such vessels of the former fixtures on the river front, or of renewed fixtures adapted to the purpose.

But, in the absence of adverse intervention on the part of the United States, can I, in the present collateral proceeding, take any cognizance of the question of purpresture?

In this case, I do not think that I ought collaterally to decide the question. It is one which may depend upon executive or legislative option of the government of the United States to enforce its rights. This remark applies more or less to all cases of alleged purpresture. The present is the case of a *de facto* wharf which, as against the State of Pennsylvania, seems, as I have said to exist also *de jure*. The existence of the wharf *de jure,* as against the United States, or the existence of a pecuniary right of wharfage from vessels in distress using the government's piers, depends upon the exercise of the right of election of the United States to proceed as for a purpresture. This question is perhaps not one simply for decision by the law officers of the United States without instruction from the proper executive department.

It must be borne in mind that if the United States elect to proceed adversarily, the question of purpresture must be judicially decided without reference to any greater or less degree of benefit or detriment to navigation from the wharf. This may possibly present peculiar reasons for executive consideration, and certainly suggests a peculiar reason against my en-

tertaining the question before any determination on the part of the United States whether to proceed adversarily or not.

The point should be fairly met, as it now fairly arises. I, therefore, state my present opinion to be that, in the absence of any proceeding at the suit of the United States for the alleged purpresture, I ought to decree full wharfage, say ninety dollars, with costs. But I think that no decree should be entered until after a reasonable delay to allow an opportunity for the institution of proceedings by the United States for an injunction to prevent the collection of such wharfage, including the particular wharfage in question.

CIRCUIT COURT. APRIL 5, 1867.

INSURANCE.

NICHOLS *v.* THE FARMERS' MUTUAL INSURANCE COMPANY, OF YORK, PENNSYLVANIA.

An absolute interest in a moveable subject relating to land, is an insurable interest.

DEBT on policy of insurance.

STATEMENT of the case.

This was an action to recover the amount of an insurance policy upon a three-story house and its furniture at Franklin, Venango county, Pennsylvania. The building was insured at $3,000, and the furniture at $1,000, and the policy took effect from October 9, 1865, to October 9, 1866.

The loss of the building and furniture took place on the 1st of February, 1866, and the damages said to have been sustained amounted to upwards of $6,000. The insurance then fell due on the 18th of May following. Due notice of the loss was given to the defendants' agent at Franklin, through whom the insurance was effected, and by him sent to the company, and this agent testified that the president of the company came to Franklin with his blanks a few weeks after the notice had been sent to the company, going to show that the notice

of loss had been received in due time by defendants, which the defence deny. The amount claimed by the plaintiff is $4,000, the amount of the policy, and the interest thereon from May 18, 1866, when the insurance fell due.

The defence was: 1. The plaintiff falsely stated that he was the owner of the premises when he applied for insurance, and there was a mortgage of $1,000 upon the property.

2. The building instead of being worth $3,000, as insured, is not worth more than $2,000; the plaintiff owned nothing but a back building which he erected upon the lot, and had no insurable interest in the premises before he leased them.

3. The plaintiff did not give notice of his loss until fifteen days thereafter, whereas the policy required immediate written notice. This neglect is, therefore, fatal to recovery under the terms of the policy.

4. The plaintiff insured the building as a hotel, but used it as a disreputable house, which increased the risk, and he never gave the defendants notice thereof.

The defendants requested the learned Judge to charge the jury, *inter alia,* as follows, viz.:

3. If the jury believe from the evidence that the plaintiff, at the time of making the insurance, was not the owner in fee of the lot of ground on which the premises insured stood, but on the contrary his only interest therein was that of a tenant under a lease; and if they further believe that he gave the answer in the application as the answer to the eleventh printed interrogatory, to wit: "My own," then and in such case the jury should find for the defendants.

4. If the jury believe, from the evidence, that the interest of the plaintiff in the building sought to be insured was not at the time of making the application and the policy, a fee simple absolute, but on the contrary was another interest, and such other interest was not so stated in the policy, then they should find for the defendants.

David W. Sellers, George W. Biddle, J. Hill Martin, for the plaintiff.

George M. Wharton, for the defendants.

CADWALADER, J.,

charged the jury as follows:

In answer to the defendants' first, second, fifth, sixth, and seventh points, the Court instructs the jury as requested. To each of the third and fourth points the Court answered that if the facts were so, the jury should find for the defendants, but these propositions respectively were not applicable if the wooden building insured by the policy in question for one year only, ending in October, 1866, was constructed by the plaintiff under the lease which enabled him to remove it at pleasure, not only during that year, but afterwards until the end of March, 1870. The Court said that the plaintiff's ownership of a building thus removeable by him, was neither a leasehold, nor, in a technical sense, a fee, but might, relatively to the contract of insurance, be considered as having been, during the term of the insurance, an absolute interest in a moveable subject, and that if the jury so found upon the facts, and if there was no fraud, nor any misrepresentation, which, in fact, misled the defendants as to the character of the risk, the plaintiff is not in law precluded, under these points, from recovering.

To which instruction of the Court in answer to the said third and fourth points, the defendants' counsel excepted.

The verdict was for the plaintiff in the full amount of his claim and interest, $4,200.

Upon appeal to the Supreme Court of the United States the opinion was affirmed by a divided Court.

DISTRICT COURT. APRIL 8, 1867.

ADMIRALTY.

SCOTT *v.* THE JANE J. SOUTHARD.

The act of Congress of 28th February, 1803, has no application to the wages of seamen improperly discharged in a foreign port.

LIBEL for wages.

CADWALADER, J.

The Court is of opinion that the act of Congress allowing three months' wages (two-thirds thereof to the libellant) does not apply, but that he was improperly discharged, and should receive, not only full wages to the time of the vessel's departure from Liverpool on her homeward voyage, but also damages estimated by the amount of such wages until he could find employment as steward in another homeward-bound vessel of the United States.

After crediting the advance at New York, and payments at Liverpool, the arrears of wages and damages aforesaid appearing to amount (less hospital money) to $77, this amount with costs is decreed to the libellant as the whole sum due to him.

CIRCUIT COURT. JUNE 26, 1867.

EQUITY.

AIKEN *v.* DOLAN.

1. Hibbert was the patentee of the latch needle used in the machines for the manufacture of woollen hosiery and other woollen fabrics. Before the date of his patent the latch needle was known and used as well as other appliances of the same nature. His improvement consisted in such a change of form in the needle as to change materially the process of manufacture and to overcome a pre-existing defect in the manufacture. *Held:*

1. That such improvement was new and useful and entitled the assignee of the patent to restrain against infringement.

2. The substitution of a merely mechanical equivalent for an arrangement invented and perfected by the patentee and described in his specifications and drawings, constitutes an infringement.

3. Where the specification of claim by the patentee was inadvertently made too broad he is not thereby debarred from the benefits of his invention under his patent; but the Court will require him to make a disclaimer under the act of Congress of March 3, 1837, and to define the exact character of his improvement and claim thereon.

4. *Semble*, that the party to an agreement with the administrator of the original patentee under which he would acquire an equitable ownership in the patent upon the performance by him of certain conditions, need not be made a party to a bill for infringement in a suit by another and subsequent assignee and a decree may be made in his absence; yet to avoid a doubt, arising from the rules of procedure in equity, it would be the better practice to join such party either as complainant or defendant.

BILL to restrain infringement of patent.

The facts are fully set forth in the opinion of the Court.

Charles Sergeant, for complainant.

John B. Gest and *E. Spencer Miller*, for defendant.

CADWALADER, J.

There have been two objections to the complainant's derivation of title from Hibbert, the patentee. One of them is founded upon the assignment to Darius C. Brown of all right title and interest in the invention "to be applied exclusively to the knitting or construction of harnesses for looms, and for other purposes." This obviously meant harnesses for looms and *harnesses* for other purposes. The objection, therefore, cannot be sustained.

The other objection depends upon the effect of the agreement of 23d September, 1862. I will consider this question as it would have been presented if the paper had been produced or its loss proved and it had been duly verified. If Herrick Aiken had fulfilled the conditions of this agreement, he would have become the equitable owner of the extended term. But as he does not appear to have, in any wise, fulfilled them, the former ownership, legal and equitable, has continued as to third persons, if not as between the parties themselves. Justice does not even require that a decree should be made expressly without prejudice to the rights of Herrick Aiken, because if he has any rights, legal or equitable, in what may be recoverable through this litigation, the complainant will be accountable to him without any such saving clause in the decree. In the meantime, the complainant is the sole party entitled, in the first instance, to redress from other persons. If the right of action had, on the contrary, been divided into fractional shares between the parties to the agreement, the defendant should not have been harassed by a suit in which they were not all made parties. The present is not such a case. Nevertheless, my first impression was that Herrick Aiken ought, ac-

cording to the rules of procedure in equity, to have been made a party complainant or defendant; and, independently of the question of verification, I still have some doubt upon the point. It is to be regretted that the objection has not been removed by amendment. For this, it is perhaps not too late, even now, to apply, if the complainant is desirous to prevent a recurrence of the question in the court of appeal.

The case will next be considered upon the merits of Hibbert's claim to have been the inventor of the *latch needle* as an optional substitute for the former *spring hook* needle in knitting machines. The latch needle has not altogether superseded the spring hook needle. Both are in use; and the spring hook needle, though more fragile, may be a preferable implement in the manufacture of certain fabrics of the finer kind. The hook of the latch needle is rigid. The spring hook needle is hollowed at the proper point for the reception of the end of the hook when depressed. Of this hollow space, and of the machine by which it was made, drawings were published more than a century ago. The hollow thus formed was, long before Hibbert's patent, designated in print as a *longitudinal groove.* It acquired, however, in the latch needle, the more distinctive character of such a groove. In this needle, a pivot passes across the groove through each side of it. On this pivot, the latch turns freely, lengthwise, in opposite directions towards and from the hook. It is thus turned by the loop of yarn passing forward and backward. This alternating longitudinal motion of the latch is arrested, in the former direction, by the hook, and, in the latter direction by the termination of the groove into which the latch falls back.

The specification of Hibbert's patent stated that the latch needle was designed to work on the knitting frames theretofore used. It has been objected that the specification does not describe the adaptation of this needle to knitting machines. To this objection a sufficient answer is that he claimed only the invention of a new and improved knitting needle, and not the invention of any adaptation of this improved implement. The latch needles are to this day bought and sold and imported from

abroad, separately from the knitting machine, as the spring hook needles are, and had previously been.

There is no reason to doubt that Hibbert honestly believed himself the *first* inventor of the latch needle. There is evidence tending to refer the date of his invention to the year 1846. Its true date certainly was not later than 1847. His patent was issued on 9th January, 1849. The introduction of latch nedles into general use was, in the language of the answer in this case, "obstructed perhaps and retarded by the necessity of altering machines, changing the nature of the fabrics, and, in some measure, by the doubts and prejudices of manufacturers." But, as the answer states, the manufacture and use of such needles gradually increased in extent until 1852, and having, by this time, become general, afterwards increased more rapidly, "causing the alteration of machines and fabrics to suit" them, etc. The testimony shows that this more rapid increase did not begin till after 1853, and that it may probably have been due mainly to improved adaptations of knitting machines. On 29th December, 1862, it was decided by the commissioner of patents to extend Hibbert's exclusive privilege for seven years after the expiration of the first term of fourteen years; and it was extended accordingly. This decision could not have been made without proof that he had not derived a fair profit from his invention during the first part of the original term. The decision, having been made after public notice and official investigation, shows that throughout the United States, he was generally considered, as he still was considered at the patent office, the first inventor. This belief may have been confirmed by the knowledge that in February, 1849, the month next after that in which his original patent had been issued, the invention was patented in England to another person, as a novelty there. For some time after this extension, the rights of Hibbert appear to have been generally recognized in the United States. A person who, since 1853, has constructed "perhaps 1,000" machines for latch needles, took, in 1864, a license for making and using needles under Hibbert's patent at a certain rate or toll. At the date of the

answer in this case, (6th September, 1866), an opposition to the patent seems to have been more or less organized. At this time there were, according to the answer, some forty or fifty manufactories in the city of Philadelphia alone which worked with latch needles, and employed with them from ten to fifteen thousand hands.

Hibbert's invention thus appears to have been *original,* whether the subject of it was *new* or not. What has been stated suffices to show that the subject had not been *generally* known or used either in the United States or in England. From all the proofs in the cause, moreover, it fully appears that the latch needle had never been used with profitable results in either country, certainly not in the United States. The needle, and its use, may nevertheless have been sufficiently known to a few persons to prevent it from being new. The improbability of this may diminish when we recur to the causes which prevented the invention from becoming profitable during several years next after the date of the patent.

A latch needle, according to the general description heretofore given, had been devised by Jeandeau in France, where he obtained a patent for it in 1806. His description of it was published in a printed book in 1831. How far such needles were afterwards made and used on the continent of Europe, it would be useless to inquire, because they certainly were made and experimentally used in the United States a great many years before 1846. In one prior instance at least, they were openly used in making an experimental fabric. The work, and its product, were imperfect. But both work and product were seen by persons who have not lost the recollection of them; and more than one of the needles, and a machine by which some of them were made, have been preserved to the present day. This was a sufficient prior knowledge by others to prevent the subsequent invention of Hibbert from being new. I have therefore not fully considered the objections which have been urged against Jeandeau's description of his invention, though I have not as yet been convinced of their sufficiency.

If the case rested here the bill must be dismissed. But three

questions remain for consideration: first, whether Hibbert was not the first inventor of a distinct patentable improvement of the primitive latch needle; second, whether and how his actual patent can be sustained as to this improvement; and third, whether his limited right to it has been infringed.

1. The primitive latch needle—not only that of Jeandeau, but likewise that made and used, as above, in the United States—was formed without any elevation, or swell at the middle of the groove, and without any depression beyond the pivot to that extremity of the groove which is farthest from the hook. At this extremity of the groove, where the latch falls back, the end of the latch must, in order that the loop may pass under it, and raise it, be above the surface of the needle. This remark applies both to the primitive latch needle already described and to the improved latch needle hereafter described. But from this cause in the primitive needle, the end of the latch, when at this extremity of the groove, had necessarily a projection upward from the surface of the needle. Now, in the primitive needle, the yarn, when passing backward from the hook, was held down to the surface, first of the needle, and afterwards of the latch, and was thus, on reaching the projecting end of the latch, at the farthest extremity of the groove, jerked over the projection with more or less of shock immediately following tension. The strain with shock must thus have occurred after every stitch. Whether any consequent injurious effect was externally perceptible in the texture of the fabric is uncertain. There may have been none thus perceptible. But, however this may have been, there certainly was here, in theory, a defect in the operation of the primitive needle, a defect which it certainly was desirable to remedy. A needle of this primitive form was represented in the drawing which accompanied Hibbert's caveat filed in the confidential archives of the patent office. The date of this caveat was 31st March, 1847.

In the course of the summer of 1847, Hibbert, when at work in a manufactory of coarse hosiery, made, or caused to be made, latch needles, with a curved elevation, since called a swell,

which was highest at the middle of the groove, and with such a corresponding elevation of the pivot that the end of the latch was depressed when it fell back at that extremity of the groove where the latch of the primitive needle had projected upward. The curvature of the swell was determined so as to effect this depression of the latch, with a sufficient *longitudinal* extension of the latch, beyond the farthest extremity of the groove, to receive the returning thread underneath. The remedy of the former defect was thus, in theory, complete. The improvement, though depending upon a change in *form,* was, in purpose and effect, a change in a material part of the *process* of manufacture. Tension of the yarn occurred at the swell, but was graduated so as to avoid shock.

The witness Emerson has verified not only one of these working needles which has been preserved, but also a blank, as it is called, of another one, that is to say, an unfinished needle, with the swell, prepared for the process by which the groove was to have been made. He states explicitly that he commenced making such needles in June, 1847, and continued making them until October, 1847. The earliest construction of a needle with such a swell by another person was at a later period in that year. Emerson, who worked, by the hour, for the hosiery company by whom Hibbert was employed, is explicit as to the date of the summer of 1847. Two other witnesses depose not less explicitly to the making of such needles by Hibbert. One of them says it was in the summer of 1846, and fixes the time by a visit of the third witness to Squam and Cape Ann during the summer. The latter witness deposes that it was in the month of June, immediately after the battles of the Rio Grande, and that he did not know whether it was 1846 or 1847; adding, "I went to Cape Ann on a visit immediately after those battles, and what fixes it in my mind is the old gentleman whom I visited was much taken up with the matter, and could talk of nothing else; he was very patriotic; and during my stay at Cape Ann there was one of those needles made and put into the loom." It is to be observed that though the first battles on the Rio Grande occurred in May, 1846, yet in the

following year the campaigns elsewhere in Mexico were probably of quite equal interest to the witness's talkative patriotic friend, and that the witness himself says he does not know whether the year was 1846 or 1847. I would have some difficulty in reconciling 1846 with Hibbert's drawing which accompanied the caveat of 31st March, 1847. There is no such difficulty if we apply the testimony of these two witnesses to the year 1847. Thus understood, they confirm Emerson, and he confirms their statements. The specification of Hibbert's patent was prepared afterwards. It states that he constructed his needle in the *general form* shown in drawings, all of which represent a needle with such a curved swell.

He thus appears upon the proofs to have unquestionably been the first inventor of such an improved latch needle. But independently of any question as to the legal sufficiency of the specification, the respondent has relied on the drawings accompanying it as showing an upward projection of the end of the latch greater than consists with his having had the conception of any true theory of this improvement. The drawings were sketched very roughly; and without a comparison of them with the model in the patent office, there might possibly have been some little doubt under this head. The doubt is precisely such an one as a model may properly resolve. The model has been produced. Upon a first inspection of it, the doubt seemed to be increased rather than removed; for the latch did not fall back to the bottom of the groove. An examination showed, however, that the latch has not now the *free turn or sweep back* described in the specification. This want of free play in the latch was evidently occasioned by an accidental compression of the groove. The cause of the compression was apparent externally. The latch, when it was gently forced down to the bottom of the groove, where it would have dropped back, if the play were free, had no upward projection. Nor had the latch in the needle produced by Emerson in which the play was free. The accidental condition of the model is unimportant. Its normal condition is quite obvious, and, when properly considered, removes any doubt which the drawings might otherwise have suggested.

2. But when the actual invention is thus referred to this improvement alone, the claim in the specification is too broad. It states that the invention consists in the application of the latch or tongue, in connection with the hook of the needle sweeping freely back and forth upon the centre pin. The general operation of a latch needle is described without any specific restriction to the form represented in the drawings. Then follow the words, "What I claim as my invention . . . is the application of a latch or tongue applied to the hook of the needle and operated as herein described." If the knowledge of latch needles of the primitive form had been universal, or even general, among those best acquainted with the use of knitting machines, the declaration that he constructed his needle in the general form shown in the drawings might perhaps have sufficed to restrain the claim to the specific improvement in the curved needles exemplified in the form with a swell, and including, of course, other curvatures of equivalent effect. But this interpretation is both morally and legally inadmissible. According to the proofs of the state of the art at that period, the knowledge of the primitive latch needle, though quite sufficient to defeat a subsequent patent, was very limited, so limited as to exclude all possibility of the inference of any general knowledge on the subject. The patent is, therefore, broader than the actual novelty of the invention.

By a proper disclaimer of the invention of latch needles without any such curvature, the patent would, however, be sustainable for the actual improvement. The complainant proposes, through his counsel, to disclaim any construction of a latch needle which has not a swell, or its equivalent, substantially as shown in the drawings, and to repeat, in the words of the original specification, that what he claims as the invention of the patentee is the application of the latch or tongue, etc., operated as therein described. The effect of such a disclaimer will be to deprive the complainant of all right to recover costs in the present suit. But a court of equity sometimes considers that which might and ought to be done as having already been done. There may, therefore, be a decree for a perpetual in-

junction, each party to pay his own costs, without any actual previous disclaimer of record in the patent office. According to the decision of the Supreme Court in O'Reilly *v.* Morse, 15 How. 121, it might perhaps be supposed that I should go farther and before any actual disclaimer decree an account, or order an issue *quantum damnificatus.* But I do not think that a court whose decision is liable to revision upon appeal should, in such a case, make any decree beyond the perpetual injunction, without an actual disclaimer previously recorded in the patent office. In the present stage of the case, therefore, I can do no more than award the injunction, with leave to disclaim, and afterwards to move for such further order of an account, etc., as may be deemed proper. Whether an injunction shall be thus awarded depends upon the decision of the third question.

3. Has the defendant infringed the complainant's rights, restricted as they are to the specific improvement invented?

It will be recollected that the latch needle with a curved swell was used by Hibbert in the manufacture of the coarsest fabrics. Instead of a curved elevation thus highest where the pivot crosses the groove, the latch needles afterwards used for finer work had a curved depression beyond the pivot towards the extremity of the groove which is farthest from the hook. For the prevention of shock or jerk at the end of the latch this depression was in effect a mere equivalent for the swell. In the application of this remark the comparison must be with the primitive latch needle. The curved depression was, in another respect, an improvement upon the swell. This improvement consisted in maintaining a more equal tension of the yarn.

The defendant objects that the needle with a swell was unfit for the manufacture of finer fabrics, that, for all fabrics, the swell was a positive disadvantage, instead of an improvement, and that the curved depression is altogether different, and was a real improvement. He admits and justifies his use of latch needles with the latter curvature. On examining these needles their curvature appears to have been so determined as to become

a precise equivalent for the swell in preventing an upward projection of the end of the latch at the extremity of the groove farthest from the hook. Assuming the correctness of his objection to the swell, and of his assertion of the superiority of the depression, these are not absolute but relative differences between the effects of the two curvatures. The latter curvature was at least a partial adoption of the patented improvement, both in theory and in practice, and was, therefore, an infringement.

The defendant has also used other latch needles with just such a curved swell as the drawings of Hibbert's patent exhibit. This he justifies or excuses upon the allegation that the swell was a mere objectionable excrescence caused by the method of making the needles. In the language of his principal witness, they are made by swedging out the slit or groove, instead of sawing it out. He describes this process of swedging, and how it may produce the bulge or swell upward. The argument hereupon is that by filing down the swell, the needles, though impaired in strength, might be more useful for certain kinds of work. To all such arguments, upon the mere question of infringement, the ordinary answer would suffice. Let the swell be filed off, and the needle without it may be used. It is not necessary, therefore, to inquire whether the spring needle might not be preferable for such work as would require the swell to be filed off.

But upon this part of the case, I was, during the second argument, very desirous to learn whether, before Hibbert's patent, *spring needles* had been made with such a bulge or curvature. They are now sometimes made with it; and if this had occurred before the patent I was not quite certain whether it might not perhaps, with reference to the phraseology of the specification, have some legal operation upon the effect of the complainant's proposed disclaimer. It now appears that spring needles were, of old, made with a lateral or outward bulge; but it has not appeared that they ever had a bulge or swell upward. The inquiry, therefore, does not arise; and this part of the case depends upon the question of infringement alone.

Upon this question the argument for the defendant cannot be sustained.

He should, therefore, be enjoined against making or using any such needles as those of which specimens are exhibited on the paper annexed to the deposition of John Taylor, and against using any needles of such a curvature as to depress the end of the latch where it falls back at the extremity of the groove farthest from the hook, or any curvature of equivalent effect.

Decree.

This cause having been brought to a final hearing upon pleadings and proofs, and counsel for the respective parties having been heard thereon, and on a rehearing thereof; and the same having been duly considered by the Court, it is found and hereby ordered, adjudged and decreed that in the letters patent for a new and improved knitting needle, upon which this suit is brought (which letters patent were granted to James Hibbert, January 9, 1849, and extended for seven years from the 9th January, 1863), the patentee has inadvertently and through mistake made his specification of claim too broad, claiming more than that of which he was the original or first inventor, to wit, a latch needle generally.

And it is further ordered, adjudged and decreed that the said James Hibbert was the original and first inventor of the improved knitting needle represented in the drawings annexed to his specification in said letters patent, such improved knitting needle having a curved elevation, since called a swell, as represented in said drawings, through which swell a longitudinal groove is cut, in which groove the latch is pivoted, and sweeps freely to and from the hook, as described in the specification, and shown in the drawings of said letters patent; and that the said letters patent so granted to him, said Hibbert, as aforesaid, are good and valid for such improved latch needle.

And it is hereby further ordered, adjudged and decreed that the complainant is the true and lawful owner, to all intents and

purposes of this case, of said letters patent, and of the exclusive right to the invention secured thereby as aforesaid.

And it is hereby further ordered, adjudged and decreed that the complainant has leave to make disclaimer, in conformity with the provisions of § 7 of the act of Congress, approved March 3, 1837, as follows, to wit: "Disclaiming any construction of latch needles which has not a curvature or swell (substantially as shown in the drawings) or its equivalent, what I claim as the invention of the said James Hibbert is the application of a latch or tongue applied to the hook of the needle, and operated as herein described."

And it is hereby further ordered, adjudged and decreed that the construction of latch needles with a curved depression beyond the pivot towards the extremity of the groove which is furthest from the hook, in preventing an upward projection of the end of the latch when thrown back, and in the prevention of shock or jerk, is in purpose and effect a substantial equivalent for the swell or curvature before described, and is an infringement upon the said invention of said Hibbert.

And it is hereby further ordered, adjudged and decreed that the latch needles used by the defendant Thomas Dolan embody the said invention of said Hibbert and infringe upon his aforesaid letters patent, and upon the rights of the complainant under and by virtue thereof.

And it is hereby further ordered, adjudged and decreed that each party to this suit pay his own costs herein.

And it is hereby further ordered, adjudged and decreed that a perpetual injunction be issued in this suit against the said respondent Thomas Dolan, enjoining and restraining him, his associates, attorneys, agents workmen, employés, servants and confederates, and each and every of them, from making, constructing, using or vending to others to be used, and from causing to be made, constructed, used or vended to others to be used any such latch needles as he, said Dolan, has heretofore used, specimens of which are annexed to the deposition of John Taylor, taken in this cause, or any latch needles having any curved elevation or swell, or any curved depression or

other equivalent of a curved elevation or swell, or any curvature of equivalent effect.

And it is hereby further ordered, adjudged and decreed that after filing his disclaimer as aforesaid in the patent office, and upon presentation of due proof thereof, the complainant may move this Court for such order for an account, or any further order as may seem proper.

And this cause is continued.

DISTRICT COURT. SEPTEMBER 20, 1867.

ADMIRALTY.

POMEROY *v.* THE AUTOCRAT.

A contract with mariners stipulated that three months' wages shall be paid in advance at the port of departure, and payment was so made in gold. The contract being performable in two stages and at two places, the payment was in part execution, and the differing values of money could not be considered at the place of final settlement.

LIBEL for wages.

CADWALADER, J.

The seeming difficulty in this case may be obviated by distinguishing between the ordinary meaning of the word *advance* and its meaning in the contract in question.

This contract, interpreted with proper consideration of the circumstances, may be understood as having been performable in two stages and at two places. The so-called advance, as the caption of the column indicates, was payable in California, where so much of the contract was to be executed. The rest of it was to be executed in Philadelphia at the end of the voyage. The part executed in California was conventionally concluded there. Whatever was received, whether gold or anything else, was conventionally estimated at a given amount. Perhaps if the contract had not been so executed this part of the wages might not have been demandable in the specie, and at the rate, in which it was paid. But this is unimportant if there was a final settlement *pro tanto* of the so-called advance.

Upon the argument for the respondent, the contract would have been illusory, because, at the end of a voyage of ordinary duration, the so-called advance would have been payment in full, leaving nothing to be received at the end of the voyage.

I think that I can interpret the contract according to the apparent justice of the case, and that there should be judgment for the libellants.

DISTRICT COURT. OCTOBER 4, 1867.

ADMIRALTY.

WILLIAM BARNES, LATE MASTER AND PART OWNER OF SCHOONER PEQUONNOCK, *v.* THE NAUTILUS STEAMSHIP COMPANY, OWNERS OF THE STEAMSHIP WEST CHESTER.

It is the duty of a navigator to have knowledge of legislative regulations as to the carrying of lights by vessels under way; and in a case of collision the liability would rest with the vessel whose master's ignorance in this respect caused the collision. It is otherwise where such ignorance, although it existed, did not cause the disaster.

LIBEL in cause of COLLISION.

THE REPORT of the nautical assessors to whom it was referred describes the disaster as follows: "The schooner Pequonnock—200 tons, new, and 280 tons old measurement—from Philadelphia, bound to Massachusetts, on night of 20th July, 1866, steering N. E. by E. with wind at S. E. by S., and going about 6 knots, at a few minutes before 12 o'clock saw a bright light on the lee bow, or to the N. E., which continuing to approach, the Pequonnock collided with what proved to be the steamer West Chester, from New York, bound to Wilmington, by which collision the schooner sank in a few minutes, and causing the steamer to leak badly, making it necessary, to save the lives of those on board, to run her on shore on the coast of New Jersey, whereby she became a total wreck."

OPINION UPON REPORT OF ASSESSORS FIRST MADE.

CADWALADER, J.

It is quite certain that the lookout from the steamer was insufficient, and that after she made the light on her starboard bow, her course was recklessly pursued when it should have been changed. She was, therefore, in fault independently of any question as to the position of her lights. Whether she would have been adjudged in fault because her green and red lights were placed so as not to be discoverable at the distance prescribed by the act of Congress, need not be decided. But when we come to consider whether the schooner was also in fault, it may be borne in mind that although the lookout from the schooner was proper and sufficient, neither of these lights was in fact seen from her.

Upon the question whether the schooner was not in fault, I cannot, upon my present information, altogether concur in opinion with the assessors. When I shall have explained the reasons of my present non-concurrence, it will be seen that I need further information from these experienced gentlemen.

The master of the schooner explicitly testified that although he had seen the bright light for a long time he did not, even at the moment of collision, know that it was the light of a steamer. So long as he may reasonably have supposed her a vessel at anchor, this ignorance of her true character is accounted for satisfactorily. But there is no doubt from the evidence that, for some time before the collision, he knew her to be a vessel under way, or ought to have known it. Now, the act of Congress expressly prohibits the carrying of a bright light by any vessel under way except a steamer. A navigator's ignorance or unmindfulness of this legislative regulation was altogether inexcusable. He may have been puzzled, as counsel suggests, by not seeing the green or the red light, one or the other of which ought, according to the requirement of the act of Congress, to have been discernible at the distance of two

miles. This might suffice to excuse a somewhat prolonged uncertainty whether she might not be a fishing vessel at anchor. But the excuse fails to apply to the period of time—not a short one—during which he knew her to be an approaching vessel under way. During this period, if he had known her to be a steamer, his duty was to keep his own course unchanged. He thinks that the course of his vessel was thus maintained without any change until the instant of collision. But there is other evidence tending to prove that he may in this respect be mistaken in his recollection. In considering this evidence we must bear in mind that, for aught he knew, the approaching light may have been that of a sailing vessel. Now, if the approaching vessel was not certainly a steamer, he was bound to make a movement himself to avoid the danger of meeting her. In his state of mind, therefore, nothing was more probable than that he should give an order to luff a little. If he did so he was in fault, as he ought to have known her to be a steamer. The question is whether he did so—not whether he did so at the instant before the collision, because this would be unimportant—but whether he did so at a measurable interval of time sooner, and thus altered his course, which he should have maintained without variation.

Upon this part of the case, the only other witnesses who can have had any knowledge of the fact are the man at the wheel of the schooner, and her mate.

The man at the wheel came on deck about half an hour before the collision. He says, "I did not hold the same course from the time I came on deck till the collision. The captain told me to let her luff a little. I did let her come up two points. This was about three minutes before the collision, as near as I can say." If this measure of time was correct, the distance between the vessels was about three-quarters of a mile, when there was no such imminent peril as to excuse a loss of presence of mind; and the change of direction must in that case have been material. It is true that nothing can be more uncertain than such a measure of time. But his testimony certainly imports that there was a measurable interval of time between the order and the crisis

of extreme peril. The mate, however, heard the same order given. According to his testimony, the interval between the order and the collision was a few seconds only. But he does not seem to have been aware of the impending danger until after the order was given. His memory's measure of time, therefore, may have been too short. He looked to see if the man at the wheel had obeyed the order, and, in effect, repeated it, which he says might have occupied a few seconds, and then walked over to the side of the vessel, and saw that a steamer was coming into her.

Before I can determine whether an order was given by the master of the schooner which was executed so as to change her direction before the crisis of extreme peril, I must learn from the assessors how far the mode of contact of the vessels, and the condition of the sails of the schooner when she went down, as described by one of the witnesses, may determine the length of time between the porting of the helm and the collision.

OPINION UPON SUPPLEMENTAL REPORT.

The supplemental report of the assessors resolves the only doubt which I had entertained.

The decision must be that the steamer alone was in fault, or that if the schooner was also in fault from her master's ignorance or unmindfulness of the Congressional enactment, there was nothing done through this ignorance or unmindfulness which caused the disaster. So far as the order given by him was executed, its only tendency was to lessen the shock of the collision, whether his misapprehension of the character of the approaching vessel was excusable or not is, therefore, immaterial.

Decree for the libellants, with costs.

CIRCUIT COURT. FEBRUARY 15, 1868.

EQUITY.

THE RICHMOND & YORK RIVER RAILROAD COMPANY *v.* THE LOCHIEL IRON COMPANY.

THE LOCHIEL IRON COMPANY *v.* THE RICHMOND & YORK RIVER RAILROAD COMPANY.

1. Service of notice of process under a cross-bill upon the counsel for complainants named in the original bill will be allowed by the court, where the subject-matter of the two suits is co-extensive and identical; and where it appears that it would be within the scope of the duty of counsel to give notice to his client of the new proceeding.

The nature and limits of substituted service in equity considered.

2. Even where equity requires the sale of collaterals the court will regulate and control such sale in the interest of all the parties.

BILL and ANSWER.

THE case was this: By a contract between the parties it was agreed that railroad iron should be furnished in certain stipulated quantities and at certain times by the company defendant to the complainants, for which the complainants were to make an immediate payment of an amount in cash, and, as the delivery of the iron proceeded, their promissory notes, to be secured by placing in bank certain of their bonds as collateral security. The cash and some of the earlier notes were paid. Some delay and irregularity occurred in the delivery of the iron, which the defendants accounted for by a change of direction by the complainants as to the times and place of delivery, involving considerable embarrassment to the defendants. Afterwards they ceased to deliver altogether; but it appeared it was in consequence of the intervening insolvency of the complainants, at the time of which there was an indebtedness, actual and prospective, from them to the defendants, of about $32,000. Having obtained from the bank a portion of the securities, they gave notice to complainants of their intention to sell the same at a day and place named for the highest market value, and to apply the proceeds to the payment of their debt.

After answer, a cross-bill was prepared and filed of the defendants, setting forth the same state of facts as those contained in the answer, praying discovery and the aid of the court in obtaining and dealing with and disposing of all the collaterals applicable as security. The complainants were not residents of Pennsylvania, and had no agency or office for the transaction of business therein. The question considered in the first of the following opinions was on an application to allow substituted service of the subpœna under the cross-bill on the complainant's counsel.

The second was upon an application for an order for the sale and disposition of the collaterals.

William B. Reed and *George W. Biddle,* for the complainants in the original bill.

George W. Wollaston and *Benjamin H. Brewster,* for the defendants in the original bill.

George W. Wollaston and *Benjamin H. Brewster,* for the complainants in the cross-bill.

William B. Reed and *George W. Biddle,* for the defendants in the cross-bill.

CADWALADER, J.

As the application for substituted service was heard *ex parte,* I have considered anxiously the question whether the order for substituted service, made a fortnight ago, was proper. I have no doubt that it was rightly made, for either of two reasons. But, as the text books upon the subject are confused, and it has been enlightened by recent judicial investigations in England, I desire my reasons to appear on the record.

The authorities in England are all reviewed in two cases, one reported in 12 Simons, 140, the other in 4 De Gex, Macnaghten, and Gordon, 328. The decision of Lord Lyndhurst, in Phillips, 521, adopting the views of Sir Launcelot Shadwell in the case in 12 Simons, reëstablished the practice of substi-

tuted service as it had stood in the time of Lord Hardwicke, and before his day. If there was vacillation of opinion during the intervening period, the result was not the less certain. The subsequent statute of 15 and 16 Victoria, chapter 86, § 5, "empowers the court (of chancery) to order substituted service to be effected in such manner and in such cases as it shall think fit." In the case which I have cited from 4 D. G., M. & G., on page 341, Lord Cranworth said that "this statute made no alteration; it was only an enunciation by the legislature of what had always been the practice before." The cases before Lord Thurlow, Lord Redesdale and Lord Eldon must, therefore, be understood very differently from their application by some text writers. I refer to Mr. Smith and Mr. Daniel. In this Court there are, I believe, some unprinted cases; but it will suffice to refer to 2 W. C. C. 465, where the remarks are consistent with the practice finally established in England. The cases which depend upon the existence of certain domestic relations rest on a peculiar foundation.

The short proposition into which all the other authorities may be resolved is that whenever service can be made upon an agent whose duty it is to appear for the defendant, or to cause an appearance to be entered for him, or to give him notice of the suit, service upon such agent suffices. The difficulty has been to define a standard of the proper *ex parte* proof of such agency. The simplest case of implied authority is that in which a subpœna under an injunction to restrain proceedings at law is served upon the attorney-at-law.

In the case in 5 Simons, 502, remarked upon in the case I have cited from 12 Simons, Sir Launcelot Shadwell showed the ordinary difference between such case and a cross-bill in equity; distinguishing them on the ground that a cross-suit was unnecessary, so far as the analogy to the injunction extended, because the chancellor could suspend a decree in the original suit until the defendant in the cross-bill, though not served, should answer. But this reason does not apply to a case in which the relief sought under the cross-bill is other than simply preventive.

These remarks introduce the peculiarities of the present case; and enable me to state the two reasons upon which I found my opinion.

One reason is that the cross-bill is here, to every substantial intent, co-extensive in subject with the original bill, but no more than co-extensive. Under an original bill for an account both parties are, after the decree to account, considered as actors; and if the suit abates, it may be revived at the defendant's instance. If such a bill could be dismissed, at the complainant's option, after a decree to account, or if the remedy of the defendant, under decree upon the original bill to account, was imperfect, a cross-bill would lie; and, in that case, the service upon the clerk in court, or solicitor of the original complainant, would unquestionably be sufficient. Under the bill of a mortgagor to restrain the mortgagee from a precipitate and irregular exercise of a power of sale, the defendant is, or, at his option, may be, from the first, in a certain sense, an actor to obtain the fruits of his security. The bill recognizes this right of the defendant; and in asking that it be restricted or qualified, or its measure defined, admits that the duty of the Court is to enforce it, or to regulate its exercise for the benefit of *both* parties. The analogy to the present case must be obvious. It is, therefore, to say the least, very doubtful whether the complainants in the original suit could now, against the will of the defendants, obtain a dismissal of the bill without prejudice.

In a primary stage or stages of the case, proceedings occurred in open court which do not now appear on the minutes. These proceedings may be excluded entirely from consideration so far as the first instalments of the debt and the first batch of the securities are concerned. As to this part of the case the proceedings appear of record.

The reference ordered by the interlocutory decree made in last November was thus far equivalent to a temporary injunction, with, perhaps, a provisional decree for a partial account. If the case had rested there, the complainants could not reasonably have asked a dismissal of their bill without prejudice.

If they could have asked this dismissal at all, it would have been upon the condition to appear *gratis* to a cross-bill at the suit of the original defendants.

So much for what appears of record.

If, in the next place, we are to consider what passed orally, and if the present deficiencies of the record in this respect are to be supplied, by agreement or otherwise, it will appear, I believe, that, in consequence of abortive negotiations of compromise, proceedings under the reference to the master were indefinitely suspended, and that the original complainants afterwards, in October last, moved for an injunction co-extensive with the whole security originally intended for the creditor party. Had no such movement occurred, I should have thought that all the securities, except the first batch of them, had been legally and equitably extinguished by the acts and omissions of the parties since the contract.

This I say, subject, of course, to correction, because at a final hearing this impression might be changed. But in the preliminary stages of the case I have acted upon it. The application for the injunction as to the whole of the securities, however, if it had been made in writing, and placed of record, would reasonably have given a sort of renewed vitality to them, as far as equitable purposes might require. I therefore thought myself, as a judge in equity, warranted in imposing, if I granted the application, the obviously equitable condition that the, so to speak, fractional excess of indebtment beyond the first instalment should be considered as equitably secured upon all the originally intended securities. This, I still think, is proper if the orginal complainant asks any equitable intervention in respect to them. A very amicable relation between the litigants appeared immediately to follow this suggestion of the Court. It is perhaps no judicial concern of mine to inquire why, or how, this temporary relation, if it existed, may have ceased. The original complainants have since apparently left the court; and seem to have dropped all desire to prosecute the original suit.

If the securities, other than the first batch, are not extin-

guished, then the bill and cross-bill have, as to the whole, an identical subject. As to the first batch of securities, and the first instalment, the subject is beyond doubt identical.

Thus, therefore, *so far as anything can ever be done,* in either suit, the subjects must be identical. The reason, therefore, to allow substituted service is, in all logic, the same as, or precisely analogous to, that in the case of a bill to restrain proceedings at law.

The second reason for allowing substituted service is that two days before the filing of the cross-bill, and after it must have been drafted, the solicitor and counsel of the complainant in the orginal bill wrote a letter, *entitled as in the cross-bill,* to the solicitor and counsel in this intended cross-bill, requesting, in any further notices, to receive time to write to the place of business of his clients.

The cases from the Registrar's Book in England, in the times of Lord Hardwicke, and of earlier chancellors, and many subsequent cases, which are cited in the books to which I have referred, show that no proof could be stronger than this letter of such agency as must be deemed precisely appropriate to the purpose in question. I will ask that from the phonographic note which has been taken what I have said may be written out and placed of record. The parties and counsel will excuse the crudeness of the language, as it was not originally written.

The reasons which I have given for allowing substituted service of process under the cross-bill may possibly be insufficient if the whole relief asked in it can be obtained under the original bill, by considering the defendant in it, as a sort of actor. But, in that case, the allowance of substituted service can do no harm. I will, therefore, as at present advised, make hereafter no order under the cross-bill which will not be entitled and recorded in both cases, so that, either way, the jurisdiction will be exercisable effectively.

As to the application made to-day, which will stand over for another week, I desire counsel to bear in mind that the present stage of the cause is interlocutory, and that the absolute rights of the litigants, which may be enforceable under the final

decree, cannot as yet be demanded as of course. The only jurisdiction which is now exercisable is a conservative one, exercisable of grace, for the benefit of both parties. It is true that a creditor should not be delayed in obtaining the fruits of a security. But it is also true that whenever the aid of a court of equity is invoked in order to obtain them, its jurisdiction will be exercised with forbearance. This prevents anything like sacrifice of the security until a final decree, unless a more expeditious enforcement of his apparent rights can consist with a conservative care of the security. When these considerations are not opposed to one another or can be reconciled, an earlier exercise of jurisdiction may be proper. Thus, if in this case the creditor had offered to bid for the securities the ninety per cent. which seems to have been their originally expected value, I might, perhaps, have directed the sale immediately by such an interlocutory order as he asks.

But even that might have been attended with very considerable hardship to these debtors. It would in effect, as the securities are, in another form, their own indebtment, add ten per cent. to its original amount. To add seventy-five per cent., which is the seeming tendency of the present application, may possibly, indeed, be an ultimate necessity. But at present I am under no compulsion of judicial duty to make an order which would have a tendency to produce any such disastrous result. It is true that the order is applied for only as to the first batch of securities, and that as to these the right to demand such a decree might, at a final hearing, be unquestionable. But this does not answer the objection to the enforcement of such an absolute right interlocutorily. At the approaching regular sessions of the court the question whether proceedings have been sufficiently matured for an absolute decree of sale may arise.

MARCH 10, 1868.

APPLICATION for the sale of the collaterals.

NOTE.—This opinion was noted phonographically at the time of its delivery, and afterwards, by direction, filed.

THE Judge said:

I do not think that the defendants can proceed with the sale of the 29 first mortgage coupon bonds except under the direction of a court of equity. But they should not be delayed in obtaining, out of this part of the original security, the fruits of it to the extent of $26,098.35, the amount of the first note, with charges of protest and interest. The 29 bonds should be appraised, and a commissioner or receiver should report as to the least injurious time, place and mode of sale, in order to prevent sacrifice of them, as far as may be. Perhaps a limited time to the complainants for redemption of them by paying the amount of this note should also be allowed. To this amount they have apparently been overpaid in value by the previous deliveries of railroad iron. But there should not be a precipitate foreclosure.

Whether the defendants can claim to retain the other notes, or any of the residue of the security, may be doubtful. But this will be a question proper for the final hearing, unless an application for an injunction as to these notes and securities should, in the meantime, be thought necessary. In that case the application may become a proper one for consideration at an interlocutory hearing.

DISTRICT COURT. JULY 10, 1868.

ADMIRALTY.

TOWNSHEND *v.* THE MINA.

An award by a consul where all the parties have consented to his interposition is conclusive.

THIS was a libel for wages by the first mate of the brig Mina. Owing to alleged disobedience of orders, whereby part of the vessel's tackle was lost, the captain claimed to defalk from the wages due to the mate the cost of a hawser, etc. The mate referred the question involved, with the concurrence of the captain, to the decision of the British consul at the port

of Philadelphia. The consul investigated and decided the dispute. The mate then disregarded the award by the consul, and filed this libel just before the brig left port. Security was entered through the consul's intervention; the vessel sailed; a proctor was retained to defend the cause, and testimony was taken on both sides. The case was heard upon the allegations and proofs and arguments of the respective advocates.

Charles Gibbons and *Morton P. Henry,* for libellant.
MacGregor J. Mitcheson, for defendant.

CADWALADER, J.

This was a British vessel. The libellant shipped under articles conformable to the present law of England; but as the voyage was ended on her arrival at this port, he had an option to invoke the jurisdiction of this court, or to ask and submit to the interposition of the British consul. He adopted the latter course; and had the application been rejected by the consul, or improperly acted upon by him, or had the master or owners of the vessel not responded to the libellant's request of consular interposition, I might still, with caution, have entertained the jurisdiction. The case, however, went on, in a friendly way, to a decision of the whole subject in controversy by the British consul. Had this decision been so extravagant as to shock the intelligence of a judicial tribunal in a civilized country, I might have disregarded the award or decision. I say "award or decision," without using the words in a strictly technical sense. The result of this case was the decision of a question of considerable doubt in part against the libellant.

The consul appears to have taken great pains; and I have his written statement of the account of the libellant particularly set forth, as he adjudicated and settled it. He decided that there was due to him, in the currency of this place, one hundred and three dollars and seventy-six cents ($103.76), and the money remains in the consulate for him.

It is not for me to decide whether I should have arrived at

precisely the same conclusion as the consul did. I am quite sure that he had greater facilities for arriving at a correct knowledge of the facts than I can have. To disregard his decision would be to establish a precedent which might be very dangerous. It might tempt to much needless and improper litigation, and lead to double dealing on the part of those who, having submitted the decision of similar difficulties to the judgment of a consul, might afterwards, without reason, and for improper motives, claim the jurisdiction of this Court.

If the sum of one hundred and three dollars and seventy-six cents ($103.76) is sent within three days to the proctor for libellant, or, in the event of his refusing to accept it, is paid into court, the libel will be dismissed at the cost of the libellant.

This would not be the form of adjudication in a court of the common law, where judgment would be given at once for this amount. But I think the judgment of dismissal, after payment, more conformable to the proper method of procedure in a court of admiralty where it is unwilling to exercise jurisdiction.

I think it is my duty to add that the conduct of the consul in this case deserves great commendation; and is in striking contrast with the former course of some other consuls in other parts of the world, who, with captious opposition to courts of maritime jurisdiction, have sometimes raised diplomatic questions as to matters of slight importance and not in themselves very intricate. Such captiousness may often occasion unjustifiable embarrassments, besides much expense and inconvenience. In this case, the consul in no respect interfered with the libellant's invocation of the subsequent interposition of this Court, but merely suggested the improbability that the Court would entertain the jurisdiction. The consul appears, very properly, to have employed Mr. Mitcheson as proctor and advocate in the cause, but, in form, as proctor and advocate for the respondent, and not of the consulate.

Whereupon MacGregor J. Mitcheson, Esq., as proctor and advocate for defendant, in open court, tendered to pay to Morton P. Henry Esq., libellants proctor, the sum of one hun-

dred and three dollars and seventy-six cents as in the said decree adjudged; which said sum of money the said libellant's proctor then and there declined to accept, and appealed from the decision of the Court to the Circuit Court of the United States. This appeal was dismissed.

DISTRICT COURT. JULY 21, 1868.

ADMIRALTY.

THE TIPTOP *v.* THE J. J. SPENCER.

1. The rate of exchange and not the value of gold is the proper standard of damage in a cause of collision.
2. Ordinarily expenses to agents to and from the place of disaster should be allowed.

LIBEL in collision. The refit of the vessel injured was made and paid for at the port of Matanzas. In ascertaining the amount to be awarded at the port of Philadelphia for the sums expended, the commissioner adopted the value of gold as the standard. On exception to his report in this respect,

CADWALADER, J., said:

The Court is of opinion that the present value of gold at this port has been wrongly adopted by the commissioner in reducing the damages to the currency here. The proper standard is the present rate of exchange between this port and the place in which the charges were incurred.

The Court is also of opinion that the traveling expenses to Matanzas are not within the ordinary rule of allowing expenses of agents to and from a place of disaster, and that this part of the charges ought to be disallowed. But on this point the Court entertains great doubt of the correctness of the decision.

As to the allowance of $55 for damages to the Spencer, the case may, if the respondents ask it, stand over six weeks for further proof; and in the meantime $27.50 may remain in the registry of the Court.

The other exceptions are disallowed. The account will be restated to meet the foregoing views of the Court.

DISTRICT COURT. OCTOBER 8, 1868.

TENURE OF OFFICE.

CASE OF THE ATTORNEY OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

1. The term for which the incumbent of an office, whose duration was limited by law, had been appointed by the President with the concurrence of the Senate, expired when the Senate was in session. No appointment, in which the Senate concurred, was made at that session, and the President, in the ensuing recess, appointed another person to the office by a commission to expire at the end of the next session of the Senate.

It seems that the former incumbent's term was not extended by the tenure of office act of 2d March, 1867; and that the subsequent appointment could not constitutionally take effect, the vacancy not having happened during a recess of the Senate.

2. The constitutional power of appointment of the President and the effect of the act of Congress of 2d March, 1867, considered and discussed.

PROCEEDINGS upon the question of incumbency of the office of attorney for the United States for the Eastern District of Pennsylvania.

STATEMENT OF THE CASE.

The question depended principally upon the effect of two clauses of the Constitution. One of them provides that the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint, all officers whose appointments are not otherwise provided for in the Constitution, and which shall be established by law. The other clause provides that the President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

The 1st section of the act of Congress of the 2d of March, 1867, known as the *tenure of office act,* is in the words: "Every

person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office and shall become duly qualified to act therein, is, and shall be, entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided." The provision of the section which follows applies only to the heads of the executive department of the Government. The 2d section authorizes the President, during the Senate's recess, to suspend, for reasons and upon evidence to be reported by him to the Senate, within twenty days after the commencement of their next session, all officers except judges of the courts of the United States; and to designate a suitable person to perform, temporarily, the duties of any such officer until the Senate's next meeting and their action upon the case; but does not authorize the removal of the former incumbent, unless the Senate concur in the suspension and removal.

The 3d section enacts "that the President shall have power to fill all vacancies which may happen during the recess of the Senate, *by reason of death or resignation,* by granting commissions which shall expire at the end of their next session *thereafter.* And if no appointment by and with the advice and consent of the Senate shall be made to such office, so vacant or temporarily filled as aforesaid, during such next session of the Senate, such office shall remain in abeyance without any salary, fees or emoluments attached thereto until the same shall be filled by appointment thereto by and with the advice and consent of the Senate; and, during such time, all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office."

The words of the 4th section are, "that nothing in this act contained shall be construed to extend the *term* of any office the duration of which is limited by law."

The office of attorney for the United States was established in every judicial district by the judiciary act of 24th Septem-

ber, 1789. By the act of 15th May, 1820, the duration of the term of the office was limited to four years. By an act of 2d August, 1861, the attorney-general was charged with the general superintendence and direction of the attorneys and marshals of all the districts, as to the manner of discharging their respective duties; and they were required to report to him an account of their official proceedings, etc., as he might direct. By the same act the attorney-general was empowered, whenever in his opinion the public interest might require it, to employ and retain, in the name of the United States, such attorneys and counselors at law as he might think necessary to assist the district-attorneys in the discharge of their duties.

Before the tenure of office act, Charles Gilpin, Esq., was, during a session of the Senate, appointed to the office of attorney for the United States in this district by the President, with the advice and consent of the Senate, for a term of four years, which expired *when the Senate was in session,* on 15th March, 1868. For more than five months after this expiration of Mr. Gilpin's term, he acted constantly, in and out of court, as the incumbent of the office, and was constantly recognized as such incumbent, in correspondence and in other modes, by the attorney-general and the officers of other executive departments of the Government.

On 20th April, 1868, however, the President, during the same session in which Mr. Gilpin's term of office expired, had nominated John P. O'Neill, Esq., to the office. On 27th July, 1868, the Senate adjourned without having acted upon this nomination. On Saturday, 22d August, 1868, in the recess of the Senate, the President appointed the same gentleman to the office by a commission to expire at the end of the next session of the Senate. On Monday, 24th August, 1868, Mr. O'Neill saw the judge at chambers. He was then desirous that the judge should administer the oath of office to him, and that it should be filed in the clerks office of this court. Mr. Gilpin was not present, the state of his health not admitting of his absence from his own house. But he sent a message that he did not recognize any right in Mr. O'Neill to the office.

The judge doubted whether either of the gentlemen was a rightful incumbent. He said that he would not then administer the oath of Mr. O'Neill, or permit the filing of it in the clerk's office, because to do so might seem to prejudge the question of incumbency, and might perhaps have a tendency to make Mr. O'Neill the apparent incumbent of the office *in fact* whether he were such *of right* or not. The judge suggested that the oath could be as well taken before any other magistrate qualified to administer it, and that it might, with equal effect, be filed in the office of the law department at Washington.

The court was in session on 1st September, and on every succeeding day. On Monday, 21st September, 1868, the Senate sat and adjourned.

In the meantime, Mr. O'Neill had not been in court; and the business of the United States in court had been transacted by Mr. Gilpin, or by Mr. Valentine, who had been previously retained by the attorney-general to assist in the discharge of the duties of the office. For several days, comprising the latter part of this period, the state of Mr. Gilpin's health had been such as to confine him to his house, and the business had been transacted by Mr. Valentine. On Saturday, 19th September, Mr. Gilpin received from the attorney-general a written direction to transfer the business of the office to Mr. O'Neill.

On the 21st, 22d and 23d of September, Mr. Gilpin was confined to his house, and Mr. Valentine was in court transacting business of the United States which required attention. On the 24th neither of them was in court, Mr. Valentine having left Philadelphia to be absent until the 28th. On the 24th a clerk in the office of the district-attorney handed to the clerk of the court a written order to issue process at the suit of the United States, subscribed with the name of Mr. Gilpin as the district-attorney. The clerk of the court thereupon consulted the judge, who was informed of the instructions received by Mr. Gilpin on the 19th of September from the attorney-general. The judge postponed the consideration of the question till the next morning, saying that although he had doubted Mr.

O'Neill's right, he had also doubted whether Mr. Gilpin was a rightful incumbent; and that he doubted whether, independently of any question *of right,* Mr. Gilpin could any longer be considered as the incumbent *in fact.*

The judge said that as there might be temporary public inconvenience from uncertainty whether the Government was regularly represented in its local court of ordinary criminal and fiscal jurisdiction, he would not refuse to hear, at the request of either Mr. Gilpin or Mr. O'Neill, with due notice to the other, an argument upon the right of either of them to a provisional recognition of him as the incumbent of the office. How far such provisional recognition of either might affect the legal question of incumbency *in fact,* the judge said that he did not know; but he said that certainly such a provisional recognition could not affect the question of incumbency *of right.* This question of right to the office, he said, could not be thus decided collaterally and informally.

The judge added that, although such an argument were not desired on either side of the question, yet, if he should, without hearing one, be able, upon reflection, to form an opinion favorable to either side, it would, he thought, be his duty to act upon such opinion till the question of right should be adjudicated.

In the afternoon of the same day, the judge, at chambers, was informed by the counsel of Mr. Gilpin that he was desirous of being heard upon the question asked by the clerk. The judge suggested the propriety of giving notice to Mr. O'Neill or to his counsel.

On 25th September, Mr. Brightly, counsel for Mr. Gilpin, and Mr. O'Neill and his counsel, Mr. Hirst, were in court.

Mr. Hirst produced a letter from the attorney-general, dated 22d September, recognizing Mr. O'Neill as the attorney for the United States in this district, and renewing the direction to him to proceed in the discharge of the duties of the office.

The judge said that this letter having been written after the adjournment of the Senate on 21st September, there appeared to be a question whether the meeting of the Senate on that day

was a session at the end of which Mr. O'Neill's commission, if otherwise valid, had expired.

The adjournment and re-assembling of Congress were under a joint resolution, of 22d July last, that the president of the Senate and speaker of the House of Representatives should, on the 27th of that month, at noon, adjourn their respective Houses until 21st September, and on that day, *unless it should be then otherwise ordered by the two houses,* should further adjourn their respective houses until the first Monday of December.

The only proceedings of Congress on 21st September consisted in an adjournment under a joint resolution that the president of the Senate and speaker of the House of Representatives adjourn their respective houses until noon on the 16th day of October, 1868, and that they then, *unless otherwise ordered by the two Houses,* further adjourn their respective Houses until the 10th day of November, 1868, at noon, and then, unless otherwise ordered by the two Houses, they further adjourn their respective Houses until the first Monday of December, 1868, at noon.

Mr. Hirst asked that the hearing upon Mr. Brightly's application should be postponed until Monday, 30th September, to give an opportunity for other counsel of Mr. O'Neill to be present. This was agreed to.

On 30th September, the case, having been partially argued, again stood over at the request of counsel till 2d October, when the argument was closed.

Mr. Brightly and *Mr. George D. Budd,* for Mr. Gilpin.
Mr. Hirst, for Mr. O'Neill.

CADWALADER, J.

The act of Congress of 13th July, 1866, prohibits the dismissal of any officer from the military or naval service, in time of peace, except in pursuance, or in commutation, of the sentence of a court-martial. The act of 2d March, 1867, known as the *tenure of office* act, applies to civil offices whose tenure

is not constitutionally defined, and to which appointments cannot be made, when the Senate is in session, without the advice and consent of the Senate. In what follows, the general word offices will be understood as designating such offices. Their tenure is defined by the act in such a manner as to prevent the removal of their incumbents by the President without the Senate's concurrence, and also to prevent vacancies from occurring in a recess of the Senate, otherwise than by death or by resignation. To this intent, the tenure is, in general, continued by the act until the Senate's concurrence in the President's appointment of successors. Of two exceptions of certain classes of officers from the general enactments, one, which is at the close of the 1st section, has, of late, been much considered. It does not concern any present question. The other exception is in the enactment of the 4th section that nothing contained in the act shall be construed to extend the term of any office the duration of which is limited by law.

A previous act of Congress had limited the duration of the term of the office in question to four years. Mr. Gilpin's term expired on 15th March last. The office then became vacant, if the words of the 4th section of the tenure of office act are to be understood according to their unqualified literal import. If this literal construction would, in any great measure, frustrate the general purposes of the act, any other interpretation, comporting with the words and the motives of legislation, and with the Constitution, would be preferable. But of the offices under the Government at the date of the act, the greater number by far were held for an indefinite period.* The words of the 4th section may, therefore, be understood and applied according to their simple and literal import, without frustrating, in any material degree, the general purposes of the act.

If another meaning, not so simple, but more consistent with any apparent general motives of legislation, might be attributable to the words, it could not be reconciled, in every respect, nor for all the purposes of this case, with constitutional defini-

* See the Tabular Analysis. Report of Impeachment of the President, I. 548-554.

tions of the powers of Congress. The general enactments of the 1st section expressly apply alike to offices held under appointments prior to the act, and to those held under subsequent appointments. As to the latter, there is no doubt of the power of Congress to prolong conditionally or provisionally the tenure of an office, like that in question, beyond the expiration of any certain term in it formerly limited by statute. The prolongation might have been absolute; and there is no reason that it may not be contingent, qualified or conditional. In any such case, the original appointment of the future incumbent is for the prolonged period. By *future* incumbent, I mean, of course, one appointed after the enactment conditionally prolonging the tenure. But the present case of a person who at the time of the enactment was already in office for a limited term is different. Congress can, it is true, abrogate offices established by legislation; and can *abridge* the term, or tenure, of an existing office like this. But the Constitution does not confer any power on Congress to extend an existing term in such an office in such a manner as to prolong absolutely or conditionally the tenure of a present incumbent. This cannot be done otherwise than by a renomination, or new appointment by the President, and concurrence of the Senate, as to the additional period.

If the constitutional power to do this by mere legislation did not exist, Mr. Gilpin's term or tenure cannot have been enlarged. I perceived, from the first, this difficulty in his case; but was not disposed to assume that any part of an enactment of Congress was unconstitutional without hearing an argument of the question. In arguing it, his counsel have relied on the authority given by the Constitution to make all laws necessary and proper for carrying into execution the specified powers of Congress, and all other powers vested by the Constitution in the Government, or in any of its departments or officers.

If the aid of this power of incidental legislation could be thus invoked without first establishing the existence of an appropriate principal power, indefinite usurpation of authority by the legislative organ of the Government would be promoted.

Congress has no power thus indirectly to determine who shall be the incumbent of an office. Consequently Mr. Gilpin could not, under any interpretation of the act, be in office.

The existence of this constitutional difficulty may assist in explaining the intent and purpose of the 4th section of the act. The difficulty did not indeed apply to future incumbents of offices whose terms are of limited duration. But without looking outside of the act itself, we can see that political motives may have induced its framers to consider principally the case of present incumbents; and that if their tenure could not be prolonged, the distinction as to future incumbents may have been disregarded as comparatively unimportant. The unqualified exception of all offices held or to be held for limited terms may thus become intelligible.

Therefore, whether the constitutional power of Congress or the simple meaning of the act is to be considered, Mr. Gilpin is not, of right, in office.

Whatever may have been the state of the question of incumbency *in fact* until 19th September, when he received the attorney-general's letter of the previous day, the effect of this letter was to terminate the relations on which incumbency, independently of the question of *right,* depended. If this were otherwise doubtful, it would be necessary to consider essential peculiarities of the office which require the continuance of a relation of attorney or counsel to client. If unquestionable right in such an office might carry with it a constructive incumbency in fact where no adverse occupation of the office existed, or if actual occupation of it continuing under the assertion of a questionable right could constitute incumbency in fact, it would not follow that there could, without right, be a *merely constructive* incumbency *in fact.*

The questions upon which Mr. O'Neill's right depends are:

1. Whether the President can, during a recess of the Senate, make a temporary appointment to fill a vacancy in office in a case in which the Senate has been in session either *when,* or *since,* the vacancy first occurred.

2. Whether there was a recess of the Senate upon the adjournment of Congress on 27th July last.

3. Whether the subsequent meeting of the Senate on 21st September was such a session that their adjournment on the same day terminated a commission granted in the recess to expire at the end of their next session.

In the statement of the first question the phrase *temporary appointment* has been used. There is no such expression in the provision of the Constitution which confers on the President power to fill up vacancies that *may happen* during the recess of the Senate. This provision authorizes him to fill them by granting commissions which shall expire at the end of the Senate's next session. Such appointments have, nevertheless, ordinarily been designated as *temporary*. The expression is borrowed from the provision of the Constitution that if vacancies in the Senate *happen*, by resignation or otherwise, during the recess of the Legislature of a State, the executive of such State may make *temporary appointments* until the next meeting of her Legislature, which shall then fill such vacancies. Here the context of the phrase *next meeting* necessarily imports an extension of time in order that the vacancies may be duly filled. For this reason, and in order to harmonize the provision with that empowering the President to fill vacancies happening during the recess of the Senate, this phrase *next meeting* has been uniformly understood by the Senate, in determining the qualifications of its members, to be of equivalent import with *next session*, and to include the whole session.* There is thus a very close analogy between the two provisions of the Constitution; and the phrase *temporary appointment* may properly be understood as of like import in each.

The phrase *permanent appointment* has, by contrast, a meaning which cannot be misunderstood in its application to an appointment by the President, concurred in by the Senate.

The question will first be considered solely upon the effect of the provision of the Constitution as to the power of the President.

Those on the affirmative side contend that the provision

* The decision of General Smith's case, in 1809, to this effect, has been acted upon uniformly in a great number of cases.

must be understood as enabling him to grant a temporary commission whenever there may *happen to be* a vacancy during a recess of the Senate, whether the Senate was or was not in session when the vacancy occurred, or has or has not been since in session. The argument is that the words "may happen," upon whose effect the question depends, can be understood as meaning, not *happen to occur,* but *happen to exist,* and that this construction must be adopted because the opposite one would be less conformable to the reason, spirit and purpose of the Constitution, which, according to the argument, were only to prevent embarrassments of the Government, and occasional dangers, from the existence of vacancies in office when the Senate might not be in session.

The public inconvenience, or danger to public interests, from the continuance of a vacancy after a session of the Senate is quite as great as from the occurrence of a vacancy during a recess. It is contended that the exigencies of the Government required, therefore, a like remedy of the evil in each case; and examples have been adduced of cases in which it may be "nearly or quite impossible" for the President to send in a nomination before the adjournment of the Senate, or for the Senate to act upon his nominations though made in season for their action.

There are serious objections to so broad an extension of the Presidential power in question. Such an extension of it, if established, would enable the President to do indirectly what the Constitution does not allow him to do directly. His appointments during recesses of the Senate might be so made, and renewed, that they could not properly be called temporary. They might, moreover, be withdrawn from the consideration of the Senate. Thus he might, though the Senate were in session when the vacancy first occurred, or had sat since it thus occurred, appoint, in the recess, an officer who would be objectionable to the Senate if in session—and might, in disregard or defiance of the Senate, continue him in office indefinitely. This might be done by successive appointments and re-appointments of him at the commencement of every

recess until the end of the next ensuing session of the Senate. There is nothing in the political experience of our country to warrant her security against such temporary appointments being thus made again and again with such results. The Senate, where vacancies existed, would thus be unable to oppose any effectual check to the President's power of appointment. To avoid the danger of impeachment of a President, the appearance of defiance of the Senate might be avoided by not making nominations during the session, or abstaining in the recess from the re-appointment of rejected persons, but substituting other appointees who, if the Senate were sitting, would be not less objectionable. This would be no visionary danger where the President and a majority of the Senate are of different political opinions.

If it had been intended to give such an amplitude of power to the President, his authority to fill vacancies in office would not have been limited to those *happening during* a recess, nor limited to grants of commissions to expire at the end of the Senate's next session. He would have been expressly authorized, in every case of a vacancy existing during a recess, to grant commissions to continue until a new appointment by him with the advice and consent of the Senate.

The general question has from time to time arisen, as will be seen hereafter, in different specific forms. In some of these forms of it, the words of the Constitution might, without straining them, be accommodated to either an affirmative or a negative answer. But, in other forms of it, those persons who, in argument, support the affirmative must, in candor, admit that their construction is not conformable to either the literal or the ordinary import of the words "*may happen.*" If the purpose of the Constitution had been demonstrable to confer, as the argument assumes, an unqualified executive power to prevent at all times the continuance of any vacancies during recesses of the Senate, the latitude of construction contended for might be less objectionable, though there is always great political danger from enlarged constructions of the Constitution upon such reasons. The danger from them may be

unseen until too late to avoid it. But was the purpose of the constitutional provision thus unlimited?

According to Judge Story (Constit. § 1551), the purpose was "that the President should be authorized to make temporary appointments during the recess, which should expire when the Senate should have had an *opportunity to act* on the subject." According to the construction contended for, it is, on the contrary, unimportant whether the Senate has had such an *opportunity to act* or not. The purpose attributed by Judge Story is thus disregarded in the argument on the affirmative side of the question.

Before the adoption of the Constitution, opinions differed, as they now may differ in the abstract, whether the President's power of making appointments to office ought to be unchecked. In the opinion of some persons, he should have had the whole power, without restraint or qualification. Others were appalled with various reasonable apprehensions of enormous and frightful dangers from uncontrolled power of appointment in a single magistrate. The reasons urged on the latter side prevailed. The Constitution has, accordingly, opposed in the Senate a barrier against uncontrolled executive power of the President in this respect. The constitutional policy having been established, it must be carried into effect without the influence of any abstract prejudice in favor of the opposite political theory.

Fundamental opposing reasons of constitutional policy outweigh the argument which has been urged in favor of adopting the latitudinarian construction. The occasional evils which might be avoided through such a construction are more or less inseparable from any system of government of a free people. Under a complicated political system of mutually counteracting checks, like the government of the United States, the continuance of our freedom could not be maintained without incessant caution to guard against both executive and legislative encroachments. Either of them tends towards usurpations of despotic power, and the tendency may be so gradual as to be almost imperceptible. The dangers from such encroachments

would be more serious than from the occasional suspension or inefficiency of governmental functions through temporary vacancies in office.

More serious evils may occur through inaction of the legislative department of the government. A partial failure of the necessary annual appropriations by Congress has occurred more than once; and but for the call of an extra session, had once occurred on a large scale. Such a failure to legislate might suspend the functions of the government. This, if it occurred, would not justify the executive in a violation of the constitutional provision that no money shall be paid out of the treasury without a legislative appropriation. Every extension of executive powers under any such emergency would, as I have said, be a step towards despotism; or, as may be added, might establish it at once. All evils to be apprehended from administrative inefficiency are minor as compared with inevitable or probable consequences of the extension of legislative or executive power beyond the strict warrant of the Constitution.

It has been truly said that the dangers from extension of executive may be less than are to be apprehended from that of legislative power, because the President may, but Congress cannot, be impeached for willful abuse of constitutional power, though its limits be not exceeded. But the suggestion, however true, affords no sufficient answer to the objection against latitude in construing constitutional grants of executive power. If the general form of the present question were different, if the literal import of the Constitution were in favor of the extended power, the argument might indeed be a fair one against *excluding* a construction which would conform to the import. We have seen already that if the existence of the power in question were admitted, it might be exercisd most injuriously without any liability to impeachment. But the suggestion of the liability to impeachment may be disposed of on more general grounds. If such a suggestion were an answer to the objection against a constructive extension of the meaning of the Constitution beyond the ordinary import of its words, the constitutional barriers against undue expansions of executive power would soon be burst asunder.

The Constitution requires the President to *take care that the laws be faithfully executed.* It has been truly said that his duty, therefore, is to fill vacancies in offices *wherever the Constitution confers on him the power to do so.* This cannot imply that where the Constitution does not expressly authorize him to fill vacancies, they can be temporarily filled by him under the provision of the Constitution which requires him to take care that the laws be faithfully executed. There is no executive power conferred by the Constitution which it would be more dangerous to enlarge through a loose construction upon suggested reasons of expediency, or of relative necessity. But this provision of the Constitution has, if I am not mistaken, been sometimes invoked to aid the constructive enlargement of the provision authorizing him to fill vacancies that may happen during a recess of the Senate. This cannot be a right view of the question. In some cases in which offices are vacant, the existence of the vacancies may render it impossible for the President to see to the execution of the laws. In such cases the laws cannot be executed while the vacancies continue. In other cases there may be no such impossibility, or the temporary impossibility may not be a total one. In the latter cases he may temporarily see, as far as possible, to the execution of the laws. But he does not thereby temporarily fill the vacant offices. They continue vacant, though functions corresponding more or less to their duties may thus be executed.

This difference between filling a vacancy in office and seeing that the vacancy occasions no failure in the execution of the laws might be well exemplified in the present case of the office of attorney of the United States for a judicial district. If the office is vacant the greater part of its business, if not the whole if it, may nevertheless be transacted. The gentleman whom the attorney-general has employed under the act of 1861, as an attorney and counselor, may represent the United States in their suits and prosecutions, and may otherwise discharge the duties in the performance of which he would have assisted the district-attorney if no vacancy had occurred. Should the existence of a temporary vacancy in the principal office be estab-

lished, the circuit judge may, under an act of 3d March, 1863, temporarily fill the vacancy. His appointee will, under the Constitution, be an officer of the court. If neither of these acts of 1861 and 1863 had been passed, the President might, through the attorney-general, as the head of the law department of the Government, have retained an attorney or counselor, not so permanently as the act of 1861 authorizes, but for the occasional purposes of the exigency. Such a lawyer's temporary representation of the United States in the legal business of the district would essentially differ from the temporary incumbency of an office. He would not be an officer of the United States.

For the reasons which have been stated, my opinion upon the first question, if considered as an open one, would be that the President cannot make the temporary appointments in a recess, if the Senate was in session when, or since, the vacancy first occurred, and consequently that Mr. O'Neill is no more in office of right than he would have been if commissioned by the President during a session of the Senate without their advice and consent.

It is said, however, that the question is not open. I believe that it has never been judicially considered. But it is said that the existence of the power in question has been established by an administrative usage of forty-five years, during which appointments made in exercise of the power by successive Presidents have been acquiesced in by the Senate, and that this executive usage has, in this period, been founded on, or supported by, unvarying opinions of successive attorneys-general.

Where an executive usage has been of long continuance, with constantly recurring opportunities for judicial contestation, and the parties who might have contested have never complained, judicial tribunals may consider a truly doubtful question as to the constitutionality of the usages less open to forensic dispute than it would otherwise have been. The effect thus attributable to such a usage may, in the absence of judicial contestation, be greater if legislative acquiescence has been evinced or may be implied.

Any remaining doubt may be removed, or lessened, if uniformly concurring opinions of experienced statesmen, and of learned lawyers, in accordance with such a political usage, can be traced from an early period, more especially where such period was contemporaneous, or almost so, with the adoption of the Constitution. Where all such conditions have been apparently fulfilled, a conclusion should not, however, be judicially reached upon such grounds alone, without caution.

Have all or any and which of these conditions been fulfilled? In the outset of this inquiry it may be repeated that if the Presidential power in question had been assumed and exercised with effect, where sufficient opportunities for judicial contestation were afforded, and no person had ever availed himself of any such opportunity, the inference of general acquiescence in the constitutionality of the asserted power might have been to some extent warranted. But there never was any such opportunity of contestation.

Indirect contestation was impossible (see 17 Howard, 284), and the President's power of removal would have precluded any direct contestation, if it had otherwise been practicable when the attorney-general was not a contestant. Until the acts of 1866 and 1867, which have been mentioned, the power of Congress to define tenures of office in such a manner as to prevent removals at the mere will of the President had scarcely ever been exercised, though the legislative power to do so as to all offices whose tenure is not constitutionally defined was never doubtful.

The recently created office of comptroller of the currency was, I believe. the only one of which, at the dates of those acts, the incumbent was not removable by the President without any concurrence of the Senate, and without any statement of reasons.* The President's general power of arbitrary removal

* The acts of 1863 and 1864, made the comptroller of the currency appointable by the President on the nomination of the secretary of the treasury, and by and with the advice and consent of the Senate. The comptroller thus appointed was, according to the act of 1863, to hold the office for a certain term, unless sooner removed by the President by and with the advice and consent of the Senate, and according to the act of 1864, to hold

where the tenure had not been otherwise defined by the Constitution or by act of Congress was beyond question established. (See 13 Peters, 259.) Of this power the former existence and validity are not impliedly questioned by the acts of 1866 and 1867.

The omission to litigate the question before the act of 1867, therefore, warrants no just inference of acquiescence in the alleged administrative usage. Even under this act judicial contestation may not readily occur.

In approaching the inquiry whether, and how far, any of the other conditions have been fulfilled, it may be remarked that, from the distinguished eminence of some of the attorneys-general whose opinions will be mentioned, judicial deference might almost be due to their expositions of constitutional law, even where practical concurrence in them has not extended beyond the limits of executive administration. This may certainly be said of Mr. Taney, afterwards the venerated Chief Justice of the Supreme Court of the United States, and of Mr. Cushing, previously a judge of the Supreme Court of Massachusetts, whose opinions, while he was attorney-general, are, through the combination of doctrinal with practical instruction which distinguishes them, more useful, perhaps, than the writings of any publicist since Bynkershoek. Of course, I do not mean to intimate that through deference to any such extra-judicial opinions I should surrender the judgment which it is my duty to exercise. But my judgment cannot be uninfluenced by the deference most justly due to them. Except in one

for such term unless sooner removed by the President upon reasons to be communicated by him to the Senate. Two prior acts, no longer in force, one of them passed in 1789, organizing the government of the northwestern territory, and the other passed in 1836, organizing the government of that part of this territory which afterwards became the State of Wisconsin, were intended to execute the provision of the ordinance of 1787, that the tenure of judicial offices in the territory should be during good behavior. In the opinion of many persons there was an honorary obligation of the constitutional government of the United States thus to execute this provision of the ordinance of the previous confederation. The judicial tenure in other territories of the United States has not been during good behavior.

respect, however, opinions of attorneys-general are, in themselves, of no more weight than those of as many private lawyers of equal abilities and acquirements.

The exception, which may be an important one, is that the official opinions of attorneys-general may, for a long time, have been so uniformly acted upon by executive and legislative organs of the national Government as to have become the unquestioned foundation of a system of legislation, or of administration. Such legislative and executive usages, when uniformly acquiesced in, especially where they have been open to judicial contestation, are, as I have already said, in themselves, more or less authoritative expositions of the true meaning and effect of the Constitution. The opinion of a former law officer of the Government, when it has been the foundation of such expositions, may be an important part of their legal history, and may, therefore, be cited in explanation of them, or even as having, in itself, for this reason, a certain weight, perhaps, of authority. But the number of concurring official opinions of attorneys-general on the same point adds very little to their weight, because, in the absence of judicial decision, these law officers of the Government sometimes attribute to the opinion of an official predecessor an effect not much unlike that of an authoritative precedent. In one respect, indeed, the number of such official opinions may even detract from their weight, because, if the same question has been repeatedly stated anew, and renewals of the former opinions of attorneys-general upon it have been obtained from their successors, this may indicate that no settled administrative usage had been understood to be established under the former opinions.

In this connection I will state and explain what induced me to refer counsel, in the course of their arguments, to the opinions of commentators on the Constitution who were either ignorant of these official opinions of the attorneys-general, or entertained opinions of a seeming opposite tendency. My purpose was to show that there had not been such a distinct prevalence of uniform opinions on the question as the counsel on one side had assumed. In his argument he had, as I

thought, attributed an inherent force of authority to the official opinions which they did not possess. My reference to the commentators was intended merely as a suggestion that their opinions might be weighed in the opposing scale of his own balance. Among them was Judge Story, whose commentaries have been cited occasionally, even by the Supreme Court, as elucidating questions of constitutional law, and Mr. Sergeant, afterwards a judge of the Supreme Court of Pennsylvania, who was often followed by Judge Story, and was not less learned and wise than cautious and accurate. Such references, whether to commentators, however eminent, or to attorneys-general, however distinguished, are outside of the ordinary proper line of argument in a judicial tribunal. But they are, when due caution is observed, not absolutely improper in excepted cases; and the present case, I think, is one.

The question arose in 1823, in the same form in which it is presented in this case. The official term of a navy agent at New York expired when the Senate was in session. During the same session another person was nominated by the President; but this appointment was not concurred in by the Senate. The vacancy continuing to exist in the recess of the Senate, Mr. Wirt, then attorney-general, was of opinion that the President could fill the vacancy by a temporary appointment. Mr. Wirt thought that the phrase of the Constitution, "happen during the recess," might be understood as meaning *happen to exist in a recess,* whether the Senate had or had not been in session when or since the vacancy first occurred. He supported this opinion upon reasons of convenience to prevent vacancies in office; and upon these reasons considered his interpretation the most accordant with the spirit and purpose of the Constitution, though the opposite interpretation would, as he conceived, be the most accordant with the literal sense and natural import of the words.

In the form of the question in which it was next presented to an attorney-general, the possible dangerous political consequences of an affirmative answer were, in part, discernible. This was in 1832. A vacancy had occurred in a recess of the

Senate, by the expiration of the term of office of a register of the land office. During the same recess, a temporary appointment in his place had been made by a commission which was in force until the end of the next session of the Sente. During this next session, the person thus appointed had been nominated by the President for the permanent appointment, and had been rejected by the Senate. During the same session the same person had been nominated again. The latter nomination had been laid by the Senate on its table. The Senate had adjourned without having further acted upon the case. The opinion of the attorney-general, Mr. Taney, was asked by the President upon the question whether, during the recess of the Senate, he could appoint the same person, or any one else, to the office. Mr. Taney was of opinion that the President could.

In accommodating this opinion to the letter of the Constitution, there was less difficulty than in either of the two cases of the navy agents. The commission granted in the recess did not expire until the end of the next session, during which no appointment was concurred in by the Senate. The incumbency had thus continued until the commencement of the recess. As there had not been any vacancy during the session, the new vacancy might, even according to an almost literal import of the Constitution, be understood as *occurring*, if not *happening*, in the recess. But the difficulty in the way of accommodating such a construction to the spirit and purpose of the Constitution was much greater than in the case which had been considered by Mr. Wirt. This difficulty I have explained. How the objection was overcome, without unduly slighting it, is not easily perceivable. The answer that the President might be impeached was the only one suggested. This answer is insufficient for the reasons which have been stated.

The extent of the executive power to fill vacancies which these two opinions asserted does not appear to have been afterwards conceded. The previous tendency of Mr. Sergeant's views in an opposite direction will be mentioned hereafter. It may be remarked here that he published a revised edition of his treatise on constitutional law in 1830, seven years after the

opinion of Mr. Wirt, without any adoption of Mr. Wirt's views, and without any material alteration of his own former text on this point. Judge Story, in his commentaries, published in 1833, a year after Mr. Taney's opinion, did not cite it, nor that of Mr. Wirt, nor express any such opinion; but on the contrary followed closely the text of Mr. Sergeant. In the editions of Chancellor Kent's commentaries prior to 1841, when the opinions of the attorney-general first appeared in print, he quoted the provision of the Constitution authorizing the President to fill vacancies happening during the recess of the Senate, but did not mention the point now in question in any form of the proposition. In subsequent editions the text is unchanged; but in a note he refers to Mr. Wirt's opinion without mentioning that of Mr. Taney, who was already Chief Justice. The opinion of Mr. Wirt was quoted by Chancellor Kent, but with a reserve which by no means indicates his adoption of it.

In 1841, the question was referred anew to the attorney-general, Mr. Legare, in the broad general form of a proposition whether the clause of the Constitution authorizing the President to fill up all vacancies that may happen during the recess of the Senate, authorizes him to fill a vacancy so occurring after a session of the Senate shall have intervened. The attorney-general objected to considering the question is so abstract a form; and restated the proposition so as to make it applicable in the case of a vacancy which had occurred during a recess, and had been filled by a temporary appointment, after which the President, during a session of the Senate, had made another nomination which was not acted upon by the Senate; and so, the office being vacant in the ensuing recess, the restated question was whether the President had power to fill it again by granting a commission which should expire at the end of the next session of the Senate. In this form of the question, the attorney-general answered it affirmatively with reference to the words of the Constitution, and to considerations of necessity or expediency. It has already been suggested that, in such a special form of the question, the answer thus given could be accommodated to the words of the Constitution.

That these official opinions were not followed without scruple or hesitation appears from the constant recurrence of the question submitted, as it was, in different forms, to successive attorneys-general, Mr. Mason in 1846, Mr. Cushing in 1855,* and afterwards to others who concurred in the views of their predecessors. In October, 1862, however, Attorney-General Bates was consulted by the President as to "his power to fill a vacancy on the bench of the Supreme Court, then existing in the recess of the Senate, which vacancy existed during and before the session of the Senate." Mr. Bates, in his letter of reply, says: "*If the question were new,* and now, for the first time, to be considered, *I might have serious doubts of your constitutional power to fill up the vacancy by temporary appointment, in the recess of the Senate.* But the question is not new. It is settled in favor of the power to fill up the vacancy as far at least as a constitutional question can be settled by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, so far as I know or believe, by the unbroken acquiescence of the Senate. Deferring to the practice, and to these authorities," he gave his opinion that the power was exercisable. Conformably to these views, Judge Davis was temporarily commissioned on 17th October, 1862, during the recess of the Senate.* I believe that he did not take a seat upon the bench of the Supreme Court under this commission. The next session of that court began on 1st December, 1862. His permanent appointment was, I believe, sent into the Senate on 3d December, and confirmed by the Senate on or before

* The question was not directly involved in the subject of Mr. Cushing's opinion; but was considered by him incidentally in the course of an inquiry mentioned hereafter, as to the President's power to appoint ambassadors and other diplomatic ministers.

* In the argument at the bar, it was erroneously supposed that Judge Miller, of the Supreme Court, had in like manner been commissioned by the President during a recess, and Judge Field in a manner somewhat similar. Judge Miller was, however, commissioned on 16th July, 1862, when Congress was in session, and Judge Field on 10th March, 1863, during an extra session of the Senate. Each appointment was, of course, with the advice and consent of the Senate.

8th December, 1862, on which day his permanent commission bears date. He took his seat, as I am informed, on 10th December, 1862.

In considering the effect of the opinions of the official predecessors of Mr. Bates,* it becomes important to correct the statement, in his opinion, that the exercise of the asserted Presidential power had been "sanctioned by the unbroken acquiescence of the Senate." The statement was founded on a mistake. The supposed foundation was in the fact, of which the truth may be here assumed, that in all the cases of permanent reappointment of temporary appointees which had occurred since 1823, the Senate, in acting upon the permanent appointments, had not rejected any one merely because his temporary appointment had been made after a session in, or before, which the vacancy had first occurred; nor had, in any wise, discriminated unfavorably to any such appointee for such a reason. It is to be observed that in such a case the Senate acts upon the permanent appointment only, and not upon the previous temporary appointment. This temporary appointment cannot possibly be submitted to them for their advice and consent. The mistake was in overlooking this impossibility, and supposing that the Senate's approval of such a person's permanent appointment was a *confirmation* of his former temporary one. The Senate's concurrence in any appointment by the President is properly called a *confirmation* of it, whether the appointee had received a previous temporary appointment or not. But when the same person who was temporarily appointed in a recess of the Senate is permanently appointed, at the next session, the permanent appointment only can be *confirmed*. The word confirmation is misapplied when the Senate's concurrence in this appointment is called a *confirmation* of the former temporary one. The temporary appointment, indeed, merges in the permanent one when the latter is confirmed and accepted. But this neither makes the temporary appointment itself, nor makes the confirmation

* For a reason which will appear when we come hereafter to consider an act of Congress of 9th February, 1863, it is not necessary to mention any opinions of attorneys-general subsequent to that of Mr. Bates.

of it a confirmation of the temporary one. If the Senate rejects the appointee, or does not act upon his nomination for the permanent appointment, he nevertheless continues, until the end of the session, to be in office under the former temporary appointment if it was a valid one.

The mistake originated, I believe, in official or semi-official language of persons employed in executive departments of the Government, and from thence found its way into popular phraseology, and to some extent into that of legislation. Thus an act of Congress of 1st May, 1810, prohibiting the payment of compensation to any chargè d' affaires, or secretary of legation, unless appointed by the President by and with the advice and consent of the Senate, authorized him in the recess of the Senate to make appointments to such offices, *which appointments* should be *submitted to the Senate at their next session thereafter for their advice and consent.* If diplomatic offices only had been the subjects of such legislation, it might have been explained for special reasons of peculiar applicability which will be mentioned hereafter. But there have been other subjects. The army appropriation bill of February, 1863, prohibits the payment of any money, as salary, to any person appointed during a recess of the Senate to fill a vacancy in any existing office, which vacancy existed when the Senate was in session, and is by law required to be filled by and with the advice and consent of the Senate until such appointee shall have been *confirmed* by the Senate. And an act of 3d March, 1863, authorized the appointment of officers of the military signal corps; and, in order to allow time for a thorough examination of them, enabled the President to appoint them during the recess, requiring, in like manner, that *the appointments should be submitted to the Senate at their next meeting for their advice and consent.* The advice and consent of the Senate was, in these acts, treated as a *confirmation* of the previous temporary appointment. Notwithstanding this mistake, the acts, of course, took effect, as intended, according to the popular but legally incorrect meaning of the words. Such a use of them by Congress was not the less a mistake. The like mistake was not

always made in congressional enactments. The act of 2d March, 1799, regulating the collection of duties on imports, § 17, and the act of 22d July, 1813, for the assessment and collection of direct taxes and internal duties, § 2, each of which established collection districts, or authorized their establishment, and provided for the appointment of collectors in every district, empowered the President, in case the appointment of the several collectors for the respective new districts should not be made during the existing session of Congress, to make them during the recess of the Senate by granting commissions which should expire *at the end of their next session.**

There have, I believe, been other acts of Congress in which, as in the two latter enactments, the mistake was avoided. But it was not avoided in official parlance; and this may explain its occurrence in the opinion of Attorney-General Bates. If he had not made the mistake, his own doubts probably would not have been so readily resolved.

The mistake was corrected by the Supreme Court in 1824, in a case in which the court below had decided that, in point of law, both commissions of an appointee, the latter permanent, the former temporary, "constituted but *one continuing appointment*, the second commission operating only as a confirmation of the first"; and Mr. Wirt, then attorney-general, said in argument, in the Supreme Court, as to the two commissions, that "the *practice of the Government* had been to consider them as *one continuing commission.*" In the opinion of the Supreme Court, "the decision of the court below was founded in mistake." The Supreme Court said that the two commissions could "not be considered as one continuing appointment without manifest repugnancy," that they were "not only different in date, and given under different authorities and sureties, but were of different natures" and *durations.* It was decided accordingly that the responsibility of a surety in the official bond of a temporary appointee terminated on his acceptance of the

* Commissions under the act of 1813, appear to have been granted by the President until the end of the next session of the Senate, and *no longer.*

commission under his permanent appointment after *it* had been confirmed. (9 Wheaton, 734, 735.)

This judicial correction of the mistake is important. The mistake should be viewed in the same light with reference to the political, practical and moral, as with reference to the legal aspect of the question. The Senate could not, even before the decision of the Supreme Court, much less could they afterwards, without mere causeless vindictiveness, discriminate in the matter in question by rejecting persons who had been temporarily appointed to fill vacancies which had existed when the Senate was in session. The question of constitutional power was doubtful, or had been so considered. The temporary appointees were, therefore, morally blameless. After the decision of the Supreme Court, acquiescence in the President's assumption of the power in question could not be reasonably implied from the confirmation of an appointment which, according to the decision, was a new and different one, and was neither a continuation, nor a confirmation, of the questionable one. Thus rejection for this reason alone would have been wanton, arbitrary and unjust, and, as excluding the inference of acquiescence, would have been useless.

The supposition of acquiescence by the Senate from their not having rejected the permanent appointees appears, therefore, to have been founded in a political as well as a legal mistake.

That it was such a mistake will appear more clearly when the views in which the Senate has regarded the question are elucidated from positive sources. We may consider, first, decisions by the Senate as to the qualifications of its members, and, afterwards, proceedings of the Senate as a coördinate branch of the executive government.

The cases of Mr. Johns, in 1794, and of Mr. Phelps and Mr. Williams, in 1854, depended upon the effect of the above-mentioned provision of the Constitution as to the power of the executive of a State to fill vacancies in the Senate happening during the recess of the Legislature. The Senate, in these cases, decided that when a vacancy thus occurred in a recess, the Gov-

ernor could not fill it during a subsequent recess, the legislature having sat in the interval,—that where he had properly filled a vacancy during the recess in which it occurred, the seat, unless filled by the legislature of the State, became vacant at the end of their next session,—and that although the vacancy afterwards continued, it could not be filled by the Governor of the State.

The vote excluding Mr. Johns from a seat was twenty to seven, when a full Senate was composed of only thirty members. In the case of Mr. Phelps the whole subject was thoroughly considered and the vote was twenty-six to twelve. The case of Mr. Williams was decided without a division. It was urged in these cases with great earnestness, but in vain, that, according to the reason, spirit and purpose of the Constitution, a State should not be unrepresented in the Senate, that the evil resulting from a vacancy did not depend upon its cause, and that the provision of the Constitution must have been intended to prevent vacancies by enabling the Governor of a State to fill them temporarily so long as the legislature might be unable, or might fail, to do so. Such arguments closely resemble those which have been urged upon the present question.

It would seem incongruous that the word *happen,* upon whose application the question depends, should not have a similar import in the two provisions of the Constitution.

We find, accordingly, that a broader meaning has not been attributed by the Senate, as a coördinate branch of the executive, to the provision of the Constitution which confers on the President power to fill vacancies in office that may happen during a recess. The question was first considered by the Senate, acting in its latter capacity, with reference to the case of an office newly created by Congress, and not filed before their adjournment. If the words of the Constitution, "vacancies that *may happen* during the recess of the Senate," instead of being referred to the first occurrence only of a vacancy, are to be understood as referable to any existence or continuance of a vacancy, the Constitution gives to the President power, during the recess, to fill temporarily such newly created offices. But if the provi-

sion of the Constitution applies only to a recess in which the vacancy first occurs, he cannot thus fill them. There is, therefore, in principle, no difference between this form of the question and those other specific forms in which we have already considered it. Acts of Congress purporting to enable the President to fill such newly created offices during the recess, by temporary appointments, have already been mentioned. Such enactments have an independent effect, as legislative expositions, which will be considered hereafter, under a distinct head. In the meantime, it may be remarked here that the effect attributable to them has been considered by the Senate, in its executive capacity, incidentally to inquiries how far the President may have an occasional power to appoint, without the Senate's concurrence, commissioners to negotiate a treaty with a foreign state. An apparent digression will be necessary in order to explain how this inquiry arose.

Congress may, through the power to regulate the compensation of diplomatic functionaries, and in some other modes, exercise indirectly more or less control over the intercourse of the Government of the United States with foreign governments. But the President and Senate, if the question of compensation could be excluded, would, under the Constitution, have, in their executive capacity, almost unlimited control over such intercourse. The subject has been fully examined by Attorney-General Cushing, in a very lucid and instructive opinion of 25th May, 1855, upon the effect of the act of that year remodeling the diplomatic system of the government. In this opinion, in which, in most respects, I concur, the prior legislation and prior executive usages are historically investigated. The question, as between the President and the Senate, of his power to negotiate primarily, without their participation, a treaty, though it cannot afterwards become binding until ratified by them, is a distinct proposition which within certain limits involves no difficulty. The question may, within or beyond such limits, involve an inquiry as to his independent power to select and send the negotiator. An ambassador,* or other

* In the general sense in which the word is used in the Constitution.

public minister, whether designated as a commissioner or by any other official title, cannot, except for purposes of mere occasional exigency, be constitutionally sent abroad otherwise than under such an appointment as that of any other officer of the Government. But the President primarily represents the United States in the intercourse of their foreign relations, including the negotiation of treaties. He is by the Constitution expressly authorized to *receive* ambassadors; and it has been supposed that a power inherent in his office may enable him to send special diplomatic representatives abroad whenever it may be necessary to do so for occasional public exigencies, whether the Senate is in session or not. That even the occasional exercise of such an inherent or incidental power was jealously watched appears from the act of 1st May, 1810, which has been cited. The question of the existence of such a power and the present question, are different, arising, as they do, in part, under different provisions of the Constitution. But with reference to the legislation as to newly created offices, the present question was incidentally considered when an occasional diplomatic appointment was made in a recess of the Senate. Our present inquiry is not whether the Senate's views of the question as to an occasional diplomatic mission were right or wrong. That is here unimportant. The inquiry to be elucidated is whether the Senate, in considering that question, admitted or denied the power of the President which is now in question. Upon this point Mr. Sergeant and Judge Story have referred to certain proceedings of the Senate.

In the year 1813, President Madison, during a recess of the Senate, appointed commissioners to negotiate the treaty of peace afterwards concluded with Great Britain. Mr. Sergeant, after stating that the principle acted upon in this case was not acquiesced in, but was protested against at the succeeding session of the Senate, says that, afterwards, in 1822, "during the pendency of the bill for an appropriation to defray the expenses of missions to the South American States, it seemed distinctly understood to be the sense of the Senate that it is only in offices that become vacant during the recess that the President is

authorized to exercise the right of appointing to office, and that in original vacancies, where there has not been an incumbent of the office, such a power does not attach to the executive." He also quotes the coincident report of a committee of the Senate, made a few days later, in which it was declared that in the provision of the Constitution as to vacancies that may happen during the recess of the Senate, "the word *happen* has reference to some casualty not provided for by law," and that "if the Senate be in session when offices are created by law which were not before filled, and nominations be not then made to them by the President, the President cannot appoint after the adjournment of the Senate, because in such case *the vacancy does not happen* during the recess." It was added that in many instances, where offices were created by law, *special power was given to the President to fill them in the recess of the Senate,* and that, in no instance had the President filled such vacancies without special authority of law.

Mr. Sergeant and Judge Story quote these proceedings of the Senate, and subsequent remarks of the committee of the Senate, in such a manner as to imply that their own opinions coincided.

The proceedings of the Senate were in the year next before that of Mr. Wirt's opinion. We have seen that in 1824, the year next after his opinion, the decision of the Supreme Court that the Senate's confirmation of a permanent appointment was not a continuance of a previous temporary commission of the appointee removed any reason which there might previously have been for formal or informal protests by the Senate in such of the cases of previous temporary appointment as might involve the present question.

In 1825 a case occurred which, I think, shows that upon this question, in its general form, there was a contrariety of opinion between the President and the Senate.

This was the case of Amos Binney, whose commission as navy agent at Boston expired on 15th February, 1825, during the session of Congress. Three days after, he was nominated to the Senate for the same office. The session closed on 3d

March, 1825, the Senate adjourning without having acted on the nomination. The Senate was convened for, and was in session on, the next day, 4th March, 1825. On the 7th of the same month Mr. Binney was renominated by the President. Two days later the Senate adjourned, *having first postponed this nomination till the commencement of their next regular session,* on the 1st Monday of December. During the recess, on 22d March, 1825, Mr. Binney was temporarily appointed to the office by President John Quincy Adams, in opposition, as it would seem, to the opinion of the Senate.

The postponement of the nomination by the Senate, however it may have exceeded their legitimate power, indicated their dissent from Mr. Wirt's then recent opinion. If they supposed that the President would have the power to make the temporary appointment after their session, it does not seem at all probable that they would have passed the resolution to postpone.

Legislative expositions by Congress will next be considered, not as decisive, in themselves, of any question, but as indicating concurrence or contrariety of opinion as to the existence of the power in question. Acts of 2d March, 1799; 1st May, 1810; 22d July, 1813; 9th February, 1863, and 3d March, 1863, have already been mentioned. How many more such enactments might be found upon searching the statute book I do not know. They may be numerous. Those which have been cited are sufficient as examples. It should be recollected that they did not all apply to newly created offices. The act of 9th February, 1863, on the contrary, applies to the question in its general form.

These acts import a discrimination between cases in which the President has, and those in which he has not, the constitutional power to make temporary appointments, the difference being between the Senate's having, or not having, been in session when, or since, the vacancy first occurred—the very difference which the argument on the affirmative side of the present question supposes to have been constantly disregarded. If the acts of 1st May, 1810, and 9th February, 1863, were the only legislation to be considered, there might perhaps be dispute whether

they should be understood as affirming the power of the President, and only checking its undue exercise, or as implying denial or doubt of the existence of such a power. To the act of 1810, the former motive might, upon reasons already explained as applicable peculiarly to diplomatic appointments, be imputed less objectionably than to the act of 1863. But such a construction even of the former act, and much more of the latter one, would impute motives of legislation which perhaps are not properly attributable to Congress, because, if the President had the constitutional power, Congress had not the power directly to prevent its exercise, and, in that case, perhaps ought not to have done so indirectly. Upon the other acts there can be no such dispute. In them, the question whether Congress could vest the power in the President if it had not been conferred on him by the Constitution may indeed have been overlooked. But, however this may have been, it is quite certain, that the question of the existence of the President's power was legislatively considered. The express grant of power by these enactments implies that, in the opinion of Congress, the Constitution had not given the power to him, or, to say the least, indicates the *constant doubt of Congress* on the subject. The counsel has, in argument, cited copiously the debate in the Senate on the passage of the enactment of 9th February, 1863. The purposes for which such citations in a judicial tribunal are admissible must be very limited. One of them, under certain cautions, may, however, be to show on what points, and how, at the date of a statute, opinions differed as to what was the previous law. This debate shows that, upon the point of constitutional law now in question, two Senators, each of whom had been a judge of the Supreme Court of his own State, differed in opinion whether the President had the power, under the Constitution.

The question cannot have been overlooked by those who framed the tenure of office act of 1867. They knew that constitutional doubts could not be resolved by legislation, and that if the presidential power in question existed under the Constitution, legislation could not abridge it otherwise than by so

defining the tenure of offices as to diminish the frequency of occasions for its exercise. Aware of this, they seem to have discriminated between different specific forms of the general question, and to have intended to legislate for those cases only in which there would have been least difficulty in reconciling the President's assumption of the power with the literal import of the Constitution. We have seen that the difficulty in this respect was greatest in cases like the present one of Mr. O'Neill, where the Senate was in session when the vancancy first occurred. There is, accordingly, no provision for such cases in the act. In cases in which vacancies first occur during a recess, the presidential power is, during the same recess, unquestionable. But in such cases, according to the argument on the affirmative side of the present question, the temporary appointments of the same, or other persons, to fill the same vacancies, might be constitutionally repeated in recurring recesses. We have seen that such repeated temporary appointments, if they had not been repugnant to the spirit of the Constitution, might, perhaps, without much difficulty, have been accommodated to its letter. The 3d section of the act seems to have, therefore, been a legislative endeavor so to define the tenure as to prevent such repeated appointments, whether they would, if the tenure had not been so defined, have been constitutional or not. The section was, in short, a legislative effort to prevent the question, in this form of it, from arising. The first sentence of the section is a transcript of the constitutional provision with an insertion of the words *by reason of death or resignation,* and an addition of the word *thereafter* at the close. The purpose of introducing the words "by reason of death or resignation" has already been explained. It was to prevent as much as possible the occurrence, during recesses of the Senate, of any vacancies otherwise than by death or by resignation. The word *thereafter* was added in order to prevent the repetition of the temporary appointments to fill such vacancies. We are not at liberty to understand the word as a mere pleonasm. Congress, in making the addition to the words of the Constitution, cannot have intended to deal so lightly with

its language. If this word *thereafter* is to be referred grammatically to the nearest antecedent, which is *death or resignation,* the apparent intent of Congress to restrain the exercise of presidential power, without the Senate's concurrence, to the narrowest limit possible, is fulfilled. If the word *thereafter* is to be referred, not to this grammatical antecedent, but to *recess of the Senate,* the result must be the same, because to effectuate the same apparent legislative intent, such recess must here be understood as the recess in which the vacancy first occurred.

Now the third section is inapplicable to vacancies which first occur when the Senate is in session, whether they occur through death, or through resignation, or otherwise. This being so, it must be recollected that according to the general argument on the affirmative side of the question, if such vacancies continue till after the session, they become vacancies *happening* during the recess. It may be said, and, to a certain extent, correctly, that if the President has then power to fill them by temporary appointments, it cannot be abridged by Congress. And this, if we stopped here, might explain the omission to legislate on the subject. But it must be recollected further, that, according to the same argument, the President may fill such vacancies again and again, by temporary commissions on every recurring recess, just as, according to the argument, he may thus repeatedly fill them where the vacancy first occurred in a recess. The act omits all provision against such repetitions of temporary appointments, where the first occurrence of the vacancies was during a session, but provides against them where it was during a recess. According to the argument the necessity was the same, or equally great, in both cases. How is this difference in the legislation to be explained? The only answer to this inquiry is that Congress discriminated between cases which, in the opinion of the attorneys-general, were, in principle, undistinguishable. The whole subject was, perhaps, thought to be involved in doubt and obscurity, so much so that perhaps no precisely definable views of the general question of constitutional law are attributable to Congress.

On the whole question of acquiescence, positive or negative,

we thus find in the present case, a difference in every respect from those cases in which points of constitutional law have been established on the foundation of administrative usage. We might, for example, contrast the present question with that of the President's power of removal from office.

To recapitulate, as to the present question:

1. There has not been opportunity for judicial contestation: The existence of the power in question has not been legislatively recognized, has been denied by the Senate, has been practically asserted by Presidents only, and has not been exercised without constantly recurring suggestions by them of doubts of its existence under the Constitution: Opinions of attorneys-general have been its only support; and in these opinions, other jurists of eminence have not concurred.

All this might have been said in language more decidedly showing that the question, whenever directly litigated, will be quite open for judicial contestation. At present I cannot answer it affirmatively.

2. The second question is one upon which opinions have, I believe, differed. It may depend, perhaps, in part, upon congressional usages of which my knowledge is imperfect. In the present case, there cannot have been a recess of the Senate unless there was a recess of Congress. On every adjournment of Congress except such an occasional temporary one as does not suspend the course of business of the two houses, the interval until the next meeting should, I think, be deemed a recess. If so there was here a recess on the adjournment of 27th July last.

3. On the third question I incline to think that if the words, "unless it be then otherwise ordered by the two houses," had not been contained in the resolution of 22d July, the meeting of the Senate on 21st September would have been such a session that the commission of Mr. O'Neill, if otherwise valid, would have expired upon the adjournment on the same day. The insertion of the words which I quote might not have prevented such a result if anything had been done *by the two houses* to make the transaction of executive business by the President

and Senate possible, if the President and Senate had desired it. But the adjournment excluded all business, and nothing had been done before it to permit the transaction of any business. The Senate could not, however long they might have sat, receive a nomination to office from the President; and consequently there was, I incline to think, no such session that a temporary appointment, if otherwise valid, would have been terminated by the adjournment which occurred. I would have avoided intimating an opinion upon this point if it had not seemed necessary in order to explain my reason for expressing one upon the first question.

Upon the whole, I am of opinion that Mr. O'Neill is not a rightful incumbent of the office, and that any legal business which he may occasionally transact for the Government, under its law department, or any other department, will not be conducted by him as the local law officer. Under the attorney-general's instructions and authorization of the 18th and 22d of September, I think that the clerk of this court should recognize Mr. O'Neill's right of directing process to issue at the suit of the United States.

I consider the office, upon the question of rightful incumbency, to have been vacant, as I have said, from 15th March. But there may be a difference between Mr. Gilpin's authority before the 19th of last month and Mr. O'Neill's present or occasional future authority. The existence of such a difference depends upon the question whether Mr. Gilpin was, until the latter day, the incumbent *in fact,* though not *of right.* Mr. O'Neill cannot, through any future exercise of such authority as he now has, become the incumbent *in fact* if he is not the incumbent *of right.* His relations with the officers of the court will be thus understood. His occasional authority will be recognized as resting on this footing only, however he may describe it. There will be no implied acquiescence in his own definition of its character. Unless the definition is impliedly concurrent, such acquiescence cannot be inferred. What I have said will prevent any inference of tacit acquiescence from acts of the officers.

DISTRICT COURT. OCTOBER 20, 1868.

ADMIRALTY.

JOHNSON ET AL. *v.* THE BELLE OF THE SEA.

Payment of counsel fees in a suit brought against the assignees of a bottomry bond for an alleged balance of freight in their hands applicable in the first instance to payment of their advances, although an ulterior is not a remote consequence of a maritime necessity, and is within the cognizance of a court of maritime jurisdiction. So also as to payment by them for insurance of a mortgage on the vessel executed by the owners.

BOTTOMRY. Bond and hypothecation executed by the master at Port Lewis, island of Mauritius. The voyage was from Calcutta to New York.

STATEMENT OF THE CASE.

The libellants were assignees of the bond, having been urged, as they alleged, to take that position by all the parties interested in the ship, freight and cargo, with a view to the proper adjustment and payment of all claims on the bond, and all claims and expenses incident at the port of destination. This was done. After crediting all payments received by them from ship, freight and cargo, libellants claimed a balance of $6,360.19, and for this amount the libel was filed.

Among the items claimed for were counsel fees expended in a suit brought against them in New York by the vessel's charterer for an alleged balance of freight; also a sum paid by them for insurance of mortgage on the vessel, the terms of the mortgage requiring the owners to keep it insured; also items of commissions to libellants and charges made by them, with a claim for interest on sums expended and on the funds involved in the litigation. As to the counsel fees, the commissioners to whom the case was referred allude in their report to the twofold relation of the libellants: first, as merchants advancing on a bottomry bond; second, as administrators of

the fund, and they divide the sum between the libellants and the owners. The insurance payment they consider as properly a charge for the benefit of the owners for which the libellants are entitled to credit, and, with some modifications, they allow the charges and expenses and full interest. These allowances were the subject of exception. The point made was whether the court had jurisdiction to enforce claims of this nature in a proceeding *in rem.* against the vessel, the ownership of which had changed hands by public sale under the mortgage; not only, as was alleged, without notice to the purchasers of the lien, but after assurances by the libellants that there was a balance due the ship.

There were two opinions, one provisional, the other upon the report of the commissioners.

Mr. Perkins, for libellants.
Mr. Flanders, for respondents.

CADWALADER, J., directing order to be entered.

And now, 20th October, 1868, this case was heard upon the application of the respondents to dismiss the libel for want of jurisdiction for the reasons which are specified in their allegations filed on 21st September last.

The Court is of opinion that in the present stage of the cause the want of jurisdiction does not sufficiently appear, and refuses the application without prejudice to the right of the respondents to the full benefit of their exceptive suggestions or allegations at any final hearing or intermediate proper stage of proceedings.

And the Court order that the case be referred (unless both parties object) to Morton P. Henry, Esq., and Captain John H. Young, as commissioners to ascertain and report what amount, if any, remains due upon the bottomry bond by the vessel according to the ordinary course of adjustment and settlement of such questions; leaving open for subsequent consideration all questions depending upon express or implied

conventional arrangement or acquiescence of parties, and all questions of right of the respondents as purchasers for value without notice.

NOVEMBER 25, 1870.

The decree will be for the libellants, for the lesser of the two amounts reported by the commissioners, with New York interest, deducting such credits, if any, of cash since paid by the respondents, or received by the libellants on account of their demand, from other sources, as may be vouched in the clerk's office before Monday next. The decree will be entered on that day, unless the respondents shall, in the meantime, file an interrogatory for disclosure by libellants, on oath, of any receipts of cash, since the report, from securities held by them.

The reasons of the commissioners do not fully cover the amounts of expenditures which are allowed to the libellants by them. But I am of opinion that the court has jurisdiction, to the full amount, independently of those reasons, which, so far as they extend, are sound and applicable. The independent reason is that the whole demand, though an ulterior, is not too remote a consequence of a maritime necessity; and is thus cognizable in a court of maritime jurisdiction.

The decree must be without costs. If the libellants had properly and seasonably prepared and exhibited the statements and accounts which, through the relation assumed by them, they should have exhibited, the litigation might, not improbably, have been prevented, and the subsequent confusion as to credits claimed obviated. Moreover, their charges as dispacheurs, though liberally admitted to their full amount, are of such an amount as, for the interests of trade and navigation, ought not to receive judicial encouragement. The costs, except so far as heretofore or hereafter otherwise paid by the libellants, will be chargeable upon the amount decreed.

DISTRICT COURT. DECEMBER 5, 1868.

ADMIRALTY.

THE ESTHER.

1. While ordinarily there is no duty on the master to tranship cargo, yet where it is perishable and a market is afforded at the port of detention, damage arising from the failure to sell or tranship may be considered and allowed in a general average account.

2. The court is not bound to allow a stipulated premium or interest in a bottomry transaction; but will regard the rights of owners as well as those of lenders, in a case where the interest appears to be excessive, and the master had the opportunity to allow competition for the advances and failed to do so.

LIBEL on behalf of G. W. Smith & Company, residents of the island of St. Thomas, creditors on a bottomry bond for £2,286 2s. 2d., accompanied by instrument of hypothecation, stipulating for a premium of twenty-five per cent. The bond, etc., were executed by the master, and the repairs for which the money was raised were rendered necessary by injuries occasioned by stress of weather during the vessel's voyage from Philadelphia to Sombrero.

There were two opinions of the Court, the first of the date above mentioned.

CADWALADER, J.

The Court is of opinion that (subject to the question of the amount of maritime interest to be allowed) the bottomry bond is a lien upon the vessel. The Court is also of opinion that the navigator of the vessel was not justified in bringing back the cargo to the port of departure, but that it should have been transshipped to the port of destination or sold at the port of necessity—that consequently the lien of the bottomry bond on the cargo cannot be extended beyond the amount of general average, etc., for which the cargo was contributory. But the

Court is of opinion that the estimate of the cargo should in the account of general average be not below the amount at which it could have been sold at St. Thomas with a freight to Sombrero.

It is ordered that a statement be prepared showing how much was thus contributory by the cargo, and that the owners thereof receive out of the money in court the value of the cargo, estimatd as above, less the contributory amount thus ascertained.

It is ordered that the full amount of principal of the bottomry bond, with twelve and a half per cent. of the marine interest, be forthwith paid to the libellants out of what may remain in court, and that the case stand over for further proof as to the amount which should be allowed for marine interest.

JANUARY 8, 1869.

OPINION filed on the coming in of further proof.

The owners appear to have left the raising of funds to the captain, and not to have attended to their own interests, as they ought to have done, by raising money here. Therefore the lenders at St. Thomas should not suffer in consequence of less advantageous rates for a bottomry loan at that place.

On the other hand, the owners of the vessel should be protected against ill consequences of any such relation between the lender and the vessel as would give the lender any advantage of the character of coercive power.

The captain's duty was to have obtained for his owners the benefit of such competition for the business of the vessel as there undoubtedly would have been among the merchants of the island; and, as a bottomry loan was anticipated, should not have given the business of the vessel to a house likely to become a bottomry lender without some stipulation or limit as to the rate to be charged. Instead of this, he put the vessel into the hands of the respectable gentlemen who made the loan,

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Court is of opinion that the estimate of the cargo should in the account of general average be not below the amount at which it could have been sold at St. Thomas with a freight to Sombrero.

It is ordered that a statement be prepared showing how much was thus contributory by the cargo, and that the owners thereof receive out of the money in court the value of the cargo, estimatd as above, less the contributory amount thus ascertained.

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The owners appear to have left the raising of funds to the captain, and not to have attended to their own interests, as they ought to have done, by raising money here. Therefore the lenders at St. Thomas should not suffer in consequence of less advantageous rates for a bottomry loan at that place.

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in such a manner as gave them a lien for their advances, including costs of repairs.

Now, the relation of these gentlemen as ship's husbands to the owners of that vessel was such as to entitle the owners to the benefit of full competition for the bottomry loan. Under such circumstances I consider the advertisements for proposals and other apparent efforts to obtain money on bottomry as little better than a parade of forms. Perhaps I have expressed myself a little too strongly; but I do not think I mistake the principle I have applied if my language is overcharged. The result, as I believe, was that the vessel had not the benefit of a fair competition among bottomry lenders on the island. The actual contract, therefore, does not determine, as it otherwise would, the amount of marine interest. But the alternative amount is not to be determined by the rates in the United States or in England. It is to be determined by what should have been the rate on the island.

As I do not impute any collusion or fraudulent purpose to the captain, I must not make such a deduction from the stipulated rate as would alarm lenders in the West Indies and deter them from making such an investment. With great hesitation I have concluded to allow twenty per cent., but shall not in the least regret reversal of my judgment on appeal if this allowance should be considered too high. The general average statement will be prepared accordingly.

As to the cargo, I wish to prevent the possibility of misconception of a part of the rough minutes of my opinion of the 5th ult. On looking at those minutes, I find a direction that the estimate of the cargo in the account of general average should be not below the amount at which it could have been sold at St. Thomas with a freight to Sombrero. Of course, I did not mean that the vessel was entitled to a freight to Sombrero, which the owner earned. But as there was no market value, so to speak, at Sombrero, the actual value then could not be determinable otherwise than by the value at St. Thomas with the pro forma addition of freight as part of the value. The actual cargo was to go freight free; but this does not affect

the question of pro forma valuation at St. Thomas to determine value at Sombrero.

Another remark as to the cargo is, that though the detention of it until the complete reparation of the vessel would in an ordinary case be at the risk of the owner of the cargo, because there is ordinarily no duty to transship, yet such a rule cannot be applicable where a cargo, which is perishable, is undergoing deterioration at such a port as St. Thomas, where there could have been a very advantageous sale. Therefore, there must be deducted from the contributory amount otherwise assessable on the cargo so much loss by its owners as has been caused by the deterioration at St. Thomas of such parts as were perishable. By perishable I mean undergoing deterioration by detention. Then after the general average statement shall have been made out as if the cargo were contributory to its full value, there must be deducted from such amount so much as shall indemnify the owner of the cargo; and this amount must be added to what would otherwise be payable by the vessel, and must be paid out of the proceeds of the vessel.

DISTRICT COURT JULY 6, 1869.

INTERNAL REVENUE.

THE UNITED STATES *v.* ELEVEN BARRELS DISTILLED SPIRITS.

Under the act of Congress of 30th June, 1864, relating to internal revenue, "the person who first informs of the cause, matter or thing whereby the forfeiture is incurred," is he who first furnished information to the commissioner of internal revenue adequate to establish a ground of forfeiture; although the information so furnished was not that on which the seizure was ultimately made.

CLAIMS of William Heilman and Peter Daly as informers in a cause of information for forfeiture.

STATEMENT OF THE CASE.

A., who was in the detective revenue collection service, visited a distillery where he discovered certain facts which he deemed sufficient to establish a forfeiture. He gave information to the local collector, to the Attorney of the United States, and to the Commissioner of Internal Revenue. To the commissioner he reported in writing all the material facts. In the information to the other two officials the fact of principal importance was inadvertently omitted. This fact was consequently overlooked by these two officials, though one of them had before him a copy of the report to the commissioner in which the fact was mentioned. No seizure was made under the above-mentioned information. It did not induce in the mind of either district attorney or collector, a motive or purpose to seize. Neither of them, however, became aware of the fact overlooked as above. Each was of opinion that there was no sufficient cause of forfeiture though A. insisted that there was, and persistently protested against their inaction. He honestly believed the other facts which he had reported sufficient in themselves to show that the business of distillation was fraudulently conducted in the premises; and he was himself a distiller of great experience whose opinion that these facts indicated an excess of production over the returns was entitled to favorable consideration. While matters were in this condition, A. never having withdrawn, or in any wise qualified the information which he had given, B., who was also in the revenue collection service, detected and disclosed an unlawful removal of a few barrels of distilled spirits from the same premises. Upon the latter information, a seizure of the distillery was made by the collector; and upon the collector's report of the seizure to the district attorney, an information was filed and proclamations were duly made; after which judgment of condemnation was pronounced, no claim having been interposed. The collector and the district attorney each testified that, without the information given by B., no seizure would have been made.

The act of Congress provides that the share of penalty, etc., shall be to the use of the person (to be ascertained by the court which shall have imposed or decreed any such penalty, fine or forfeiture) who shall first inform of the cause, matter or thing whereby such fine, penalty or *forfeiture shall have been incurred.*

The question was whether B. or A. was the person who first informed of the cause, matter or thing whereby the *forfeiture was incurred.*

CADWALADER, J.

If the words of enactment had described the first informer as the person who first informed of the *cause* of *seizure,* or who first informed of the *cause* of *prosecution,* the decision might perhaps be in favor of B.; but that here the words of enactment were purposely very different, making the definition of the first informer depend upon priority of information of the cause or matter through which *forfeiture* had been *incurred;* that these were informers of two different kinds, and that each of them was different again from the plaintiff in a *qui tam* action, who was an informer of a third kind; that the obvious purpose of Congress had been that local collectors and other subordinates of the internal revenue service should not have the determination of questions like the present, and that the act of 1866 had therefore left the decision to the court by which the forfeiture was adjudicated; that the forfeiture was not *incurred* through the seizure, but was incurred independently of it, through an act anterior to it; the property not being forfeited because seized, but having been seized because forfeitable, and that the adjudication of forfeiture had a legal relation to the act through which it was incurred, an act always anterior to the seizure; that if the present case had been contested, it would not have been tried without an examination of both A. and B. as witnesses, or ought not to have been tried without examining them both; that upon the whole testimony of A. (including that as to the fact which he had previously reported to the commis-

sioner of internal revenue without previously reporting it to the district attorney or collector) a condemnation would inevitably have resulted, independently of B.'s testimony, and if it were equally clear that a condemnation would have resulted from B.'s testimony without that of A., this would leave the priority of A.'s information unaffected; that the omission of A. to repeat his whole information to everyone of the officials to whom he gave it could not prejudice him, as there had not been any wilful suppression by him, and as he had actually communicated the whole to the department at Washington from whence the whole had been transmitted hither; and that A. was therefore the first informer within the true meaning of the act.

The counsel of B. announcing an intention to appeal from this decision, the Judge said that he doubted whether an appeal could be made, but that he would allow it in order that the Circuit Court might decide whether it could be entertained. He added that he would, if B.'s counsel preferred to avoid the hazard of thus appealing, suspend entering judgment between A. and B. and submit the original question to the Circuit judge, with every disposition to adopt his opinion whatever it might be. This the counsel of B. preferred; and the foregoing statement was accordingly shown to the Circuit judge.

GRIER, J., concurred in this opinion.

CIRCUIT COURT. DECEMBER 22, 1869.

EQUITY.

THE LOWELL MANUFACTURING COMPANY *v.* WILLIAM H. LARNED ET AL.

Infringement. Mutual production of books with a view to ascertain with what profits on sales of the manufactured article the defendants are justly chargeable. Practice when issue to ascertain damages has been awarded.

BILL to restrain infringement of patent.

COMMISSIONER'S REPORT.

CADWALADER, J.

On the commissioner's report of the question submitted there could be no doubt that the books in question must be exhibited. This the defendants' counsel concedes. But the true question as developed in court, appears to be whether the defendants can equitably be required to produce their books without a reciprocal exhibition by the complainants of their books, or an opportunity to the defendants of inspecting them. Considering the character of the peculiar question of damages, and the familiar equitable analogy of proceedings under a decree to account, I think the master should make no compulsory order in the premises without a sufficient assurance to the defendants of reciprocal disclosure by the complainant.

DECEMBER 23, 1869.

It was not intended by the order made yesterday to suspend investigation of the amount or particulars of the defendants' sales of carpets of the pattern in question, or to preclude compulsion of them to produce their books exhibiting such sales. The order was intended to apply merely to the production of evidence from their books to show the amounts of profit in such sales, that is to say, the excess of price netted in cash above the cost of the raw material and manufacture, etc. On the latter subject, it is, in the opinion of the Court, a sufficient fulfilment of the purpose of the order made yesterday to state that if the complainants proceed to obtain the disclosure in the question of *profits*, they, by so doing, will elect to submit themselves to a like disclosure as to the amounts of their own *profits* per yard, piece or otherwise, but not as to the amounts or particulars of their own *sales*, otherwise than as the same may, of necessity, appear incidentally to evidence on the question of the amounts of their own profits.

On this condition the examination, where suspended before the commissioner, may proceed and the production of the books of the defendants may be required.

FEBRUARY 21, 1870.

The Court is of opinion that the complainants should proceed at law by filing a declaration as of the present term for the infringement complained of, to which declaration the defendants should forthwith plead the general issue, in which the complainants should forthwith join issue, and that on a trial at the bar of the court the right of the complainants to their patented privilege should be admitted, and that the questions triable should be, whether there has been any infringement and if so the amount of damages. On the trial all depositions heretofore taken in the equity suit should be read in evidence subject only to such objection as could be taken if the witnesses were orally examined, and in the meantime the Court orders that an account be taken before the master of the quantity of carpets alleged to be infringements which have been by the defendants made and sold or on hand, and the prices, etc., and that each party answer on oath all material interrogatories before the master, and that his report duly made, unless set aside upon exceptions, be *prima facie* evidence in the trial of whatever material facts he may report.

APRIL 25, 1870.

This cause having been brought to a hearing for further directions upon the verdict of the jury in the action at law ordered in this case in which action the said jury found for the complainants and assessed the damages at $500.

Whereupon upon hearing counsel upon the part of complainants and defendants and due deliberation being thereupon had it is found, ordered, adjudged, and decreed:

That the letters patent for a design for a carpet pattern No. 2754, dated August 20, 1867, granted to the Lowell Manufacturing Company of the State of Massachusetts, is a good and valid patent, and that Edwin J. Ney was the original and first inventor of the design for a carpet pattern in said letters patent described and claimed, and also that the said defendants, William H. Larned, Isaac Starr, Jr., and Israel Foster, have infringed upon the said patent, and upon the exclusive rights of the complainants under the same.

And it is further ordered, adjudged, and decreed that a perpetual injunction be issued in this suit against the said defendants, William H. Larned, Isaac Starr, Jr., and Israel Foster, according to the prayer of the bill.

And it is further ordered, adjudged, and decreed that the said William H. Larned, Isaac Starr, Jr., and Israel Foster do pay to the complainants, or their solicitor for them, the above-named sum of five hundred dollars ($500) with interest thereon from the date of the said verdict until paid.

And it is further ordered, adjudged, and decreed that the said defendants do pay to the complainants, or their solicitor, the costs of suit in this behalf to be taxed, and that in default of payment thereof or of the said other moneys above adjudged to them as aforesaid, the complainants have their execution according to law.

DISTRICT COURT. MARCH 15, 1870.

INTERNAL REVENUE.

UNITED STATES *v.* WHISKY, ETC., KELLY, CLAIMANT.

On the trial, under an information upon the 48th section of the internal revenue act of 1864, as amended by the 9th section of the act of 1866, of a case involving a question of the forfeiture of a still, and other apparatus fit to be used for distillation, and other personal property on the premises of the distiller—where no dutiable spirits out of the bonded warehouse, nor any raw materials to be used in the business of distillation, were found at the time of seizure—an amendment of the information, adding counts on the 44th section of the act of 1868, was allowed.

Under an information thus amended, a forfeiture incurred before the seizure, may be enforceable independently of the state of things existing on the premises at the time of seizure.

INFORMATION under the 48th section of the internal revenue act of 1864 as amended by the 9th section of the act of 1866.

Trial before

CADWALADER, J.

STATEMENT OF THE CASE.

The 48th section of the internal revenue act of 1864, as amended by the act of 1866, provides that all articles on which taxes are imposed found in the possession or control of any person for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of the taxes, may be seized by designated officials, and shall be forfeited and also all raw materials found in possession of any person intending to manufacture them into articles of a kind subject to tax, for the purpose of fraudulently selling them, or with design to evade the payment of the tax, and also all tools, implements, instruments and personal property whatever, in the place or building, or within any yard or inclosure where where such articles, or such raw materials, are kept.

The 44th section of the act of 20th July, 1868, enacts that any person who shall carry on the business of a distiller, with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall be fined, and all distilled spirits or wines, and all stills or other apparatus, fit, or intended to be used, for the distillation of spirits, owned by such person, wherever found, and all distilled spirits or wines, and personal property, found in the distillery, or in any building, room, yard or inclosure, connected therewith, and used with, or constituting part of the premises shall be forfeited.

The information in this case was drawn with reference to the enactments prior to the act of 1868; but the transactions in proof were subsequent to its enactment.

When the evidence on both sides had been closed, the claimant's counsel asked the Court to charge the jury:

1. That as the distilled spirits at the time laid in the libel were in a bonded warehouse of the United States, the same, by intendment of law, could not be in the possession of the claimant in fraud of the act of Congress, as alleged in said libel.

2. That as no distilled spirits or other dutiable article was in

the possession of the claimant at the time laid in the libel, or raw materials for the purpose of producing distilled spirits on the premises, the verdict must be for the claimant.

THE COURT said:

If any one count of an information in rem is good in form, and applicable to the case proved, objections to other counts are disregarded. (7 Cranch, 344.) If the record is to stand in its present form, I may probably give the instructions requested. But I will not refuse to hear an application to amend by adding a count on the 44th section of the act of 20th July, 1868. This section was apparently intended to prevent immaterial questions from interfering with a trial of the merits of cases like the present. On the part of the prosecution, it is alleged orally that the stills, and the other apparatus fit to be used for the distillation of spirits, were owned by a person who carried on the business of a distiller, with intent to defraud the United States of the tax on a part of the spirits distilled by him, and were found in his distillery, and that the other articles were found there, and in the inclosure connected therewith, and used with and constituting a part of the premises. If this allegation, which I state in language of the 44th section of the act of 1868, suffices, without any specification of what was done by him in pursuance and execution of such intent, the present information may, perhaps, be sustainable upon the combined effect of the former statutes, and this act, though it were not sustainable upon the former statutes without such aid.

But I do not think that a specification of what is alleged to have been done, in execution of the intent, can be dispensed with under the act of 1868, though it might be under the former acts. It is orally specified that in the entries and returns required by the statutes, this distiller falsely represented the quantities of materials used, and of spirits produced, in the business, to be less than the respective actual quantities, knowing them to be less. If this were specifically alleged of record, in a less condensed form of expression, the implied requirements of the 44th section of the act of 1868 might have been fulfilled. But the record contains no such specific allegation.

If I were to let the record stand in its present form, an expensive dilatory litigation, with no useful result, might ensue. If the present information were sustained, the delay and expense to the United States would nevertheless have been incurred. If the decision were the other way, the claimant would probably gain nothing, because the very decision would, or might, show that the proceeding had been misconceived, and that a new information should be filed, or an amendment of the present information allowed.

The question upon the present information is, at least, doubtful. If an application for an amendment is made, it cannot be allowed without giving to the claimant the option of a continuance. But upon the question whether an amendment should be allowed on this condition, I will hear counsel, if the application is made.

The counsel for the United States applying for leave to amend, and the counsel for the claimant opposing the application, the Court said:

The merits of the controversy do not depend upon the state of things existing at the time of the detention or seizure, but upon the question whether a forfeiture had previously been incurred. If it had been incurred, the title of the United States will have relation to the time when it was incurred; and the causes of forfeiture supposed by the seizing officer to have existed are, in that case, immaterial, if any sufficient cause alleged in the information is established by the evidence. The Supreme Court have often said, in effect, that, in such cases, the property is not forfeitable because it has been seized, but is seized because it was previously forfeited. In Wood *v.* The United States, 16 Pet. 362, and Taylor *v.* The United States, 3 How. 197, goods imported at New York, where they passed in regular form through the custom house, on valuations there approved by the public appraisers, were seized long afterwards, in the latter case at Philadelphia, in the former at Baltimore, in the hands of agents of the respective importers. The goods, in each case, were condemned as forfeitable for fraudulent undervaluation in the invoices upon which they had

been entered. In the former case the Court said that the success of the fraud in evading the vigilance of the public officers, so that it is not discovered until after the goods have passed from their custody, does not purge away the forfeiture, although it may render the detection of the offense more difficult and more uncertain.

In the latter case (3 How. 197), the Court said:

"At the common law any person may, at his peril, seize for a forfeiture to the Government; and if the Government adopt his seizure, and institutes proceedings to enforce the forfeiture, and the property is condemned, he will be completely justified; so that it is wholly immaterial, in such a case, who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause. This doctrine was fully recognized by this Court in Gelston *v.* Hoyt, 3 Wheat. 247." This rule has been thus enforced in the English Court of Exchequer. It is nothing more than the rule familiarly applied in the case of a distress. Lord Kenyon said, "I never understood a man was obliged to justify a distress for the cause he happened to assign at the time it was made; if he had a legal justification for what he did, it is sufficient; a man may distrain for rent, and avow for heriot service." (7 D. & E. 657-8.)

Leave is given to amend, on condition that the claimant has the privilege to continue the case, or, at his option, to let the trial proceed.

New counts were then added to the information, by way of amendment, which were adapted to the enactments of the 44th section of the act of 1868, or were intended so to be.

The claimant, not asking a continuance, pleaded issuably to the information as amended.

His counsel then further requested the judge to charge the jury:

1. That there is *no evidence* that distilled spirits were removed to evade the payment of the tax.

2. That so far as the evidence in this case suggests causes

of forfeiture, they did not arise at the time which is propounded in the information, and that the verdict must be for the claimant.

3. That as no causes of forfeiture are specified in the information, the same cannot be supplied by evidence, and the verdict must be for claimant.

4. That if the claimant had notified the assessor that he would close his distillery, and at said time of seizure, which is laid as the time the forfeiture accrued, there were no materials on the premises to be thereafter used in the distillation of spirits, the verdict must be for the claimant.

On which points the Court instructed the jury as follows.

1. I cannot give this instruction. There is no evidence tending directly to prove such removal. But if the jury find that the entries in the distiller's book falsely represented the quantity of materials used, and of spirits produced, to be less than the respective actual quantities, and were known by him, or by those conducting his business, to be so, this is evidence from which the fact of the removal to evade the payment of the tax may be found, if the jury believe the fact to be so.

2. If the causes of forfeiture are truly alleged in the information, the forfeiture was incurred when the acts constituting such causes were committed, provided they were committed after the claimant became the distiller, in or after May, 1869, and before the seizure. Unless they occurred in this interval the verdict should be for the claimant. But the time stated in the information is not otherwise material.

3. The prosecution cannot be maintained except for the substantial causes which the information specifies; and these cannot be supplied by evidence defining or adding to the specification of them in the information. On this third point I give the instruction requested, except that I cannot say "no causes of forfeiture are specified in the information."

4. I give the instruction requested, with the qualification, that if there was on the premises a still and other apparatus fit and intended for the distillation of spirits, the absence of materials to be used in such distillation does not, in itself alone, as matter of law, entitle the claimant to a verdict.

DISTRICT COURT. APRIL 2, 1870.

ADMIRALTY.

THE WILLIAM CUMMINGS.

1. Seamen, having received two months' wages in advance, mutinied, with a concerted purpose to intimidate the officers of the vessel, and obtain a discharge without going to sea. The revolt having been quelled by the prompt use of severe measures of repression and punishment, the crew was retained for the outward voyage. As they were sufficiently punished for this misconduct, their wages for the outward voyage were not forfeited.

2. The measures of repression and punishment, whether unduly severe or not, were not considered as part of the general treatment of the crew, on the question whether they had been used so cruelly on the outward voyage as to entitle them to a discharge at the first port of arrival.

3. This was a port where another crew could not be obtained, and the master had neither funds nor credit, and the climate was unhealthy. The crew having refused to perform any duty, and having, through concerted misrepresentation, procured their discharge by the consul at this port, were, after a long delay, re-shipped in the same vessel. The intended voyage having been abandoned, they came back in her to her home port. They were not allowed wages for the time of her detention at the foreign port while they were out of her service.

4. But as the master did not appear to have made proper efforts to get to her next port of destination, where funds would have been at command, and a new crew easily obtainable, wages for the homeward, as well as the outward, voyage were decreed, without set-off or abatement by reason of the detention abroad.

LIBEL of mariners for wages, for a voyage, which was, according to the articles, to have been from the United States to St. Paul de Loando, in Africa, (a Portugese colonial settlement,) and thence to Bahia; and further, to return in twelve months.

The vessel made the voyage to Loando in eighty-two days. Through difficulties, which will be mentioned below, the crew left her at Loando, with the sanction of the consul. She was detained there six months; and the intended voyage having been abandoned, and the crew reshipped in her, she returned to the United States, the homeward voyage occupying fifty-one days. The libellants were thus on board,

in all, about four and a half months. They demanded wages for this time, and for the longer period of the detention at Loando, which, they alleged, was wrongful. The owners of the vessel denied that the libellants were entitled to any amount whatever.

The testimony was voluminous. The hearing occupied three days. The case was argued by Mr. Cochran, for the libellants, and Mr. Coulston, for the respondents.

Upon the close of the argument, the court's opinion was delivered orally. The following note of it was made by George P. Rich, Esquire.

CADWALADER, J.

We have, in this case, an example of the ill effects of the culpable inattention to the selecting and shipment of a crew, which though now almost habitual in the United States, cannot be the less inexcusable in owners and masters of vessels. This vessel was thus unseaworthy for a time at least, through the incompetency and insubordination of the libellants and others on board. This negligence, in the shipment of a crew, does not excuse the misconduct of the crew shipped. The difficulties which occurred may probably have been increased by the fact that the first mate was the master's brother. He was probably more independent than he should have been of the master's authority. I have little doubt, from the evidence, that the second mate was, from the time of the shipment of the crew, engaged in organizing a conspiracy to subvert the discipline of the vessel, or at least in promoting a mutinous feeling, which, in part through his incitement, broke out in the Delaware before getting to sea, and was again manifested in Loando. But whether my impressions, in these respects, of the causes of what occurred, are correct or not, is of little importance to the decision of the case upon what actually occurred.

The whole crew having, at the time of shipment, received an advance of two months' wages, the libellants and others made a concerted effort, in the Delaware, so to disturb the

police of the vessel as to intimidate the master and obtain their discharge from her. Their conspiracy and mutiny, for this purpose, which are clearly proved, would have been successful if energetic measures of suppression had not been adopted. By the prompt use of such measures, the revolt was quelled, and the vessel enabled to get to sea with this crew. Whether the severity may not have been greater than was absolutely necessary, and whether the methods of coercion used were in all respects proper, are questions which need not be decided. The men appear to have been sufficiently punished for their misconduct at the outset of this unfortunate voyage. Whether the measures then used for the repression of the mutiny were blamable or not, they should not be considered as part of any treatment which can be complained of as cruelty during the voyage. The two questions of alleged severity in quelling a mutiny, and alleged cruel treatment at other times, are, in a great measure, if not altogether, distinct.

Though these men composed a bad crew, during the rest of the outward voyage, and though some of them were of inferior capacity, I do not see that such acts of subsequent positive misconduct on their part occurred before arrival at Loando as to forfeit their wages for the outward voyage. That they formed a combination during this voyage to obtain their discharge at Loando, and that the statements by which they succeeded in obtaining it were preconcerted, and were in a great measure untrue, I have little, if any, doubt. But I do not see that there was any purpose on their part of obtaining a discharge otherwise than through consular sanction; and if they had afterwards told the truth to the consul at Loando, such a previous concert of action would not have been objectionable. I think that the machinations of the second mate were secretly continued, more or less, throughout the voyage, and that the resentment and ill humor of the crew were probably kept up through occasional acts of undue severity on the part of the first mate. These acts, though doubtless greatly exaggerated, and somewhat distorted in the testimony, were, I think, arbitrary, hasty and harsh, to say the least; and if the captain did

not occasionally err in like manner, he does not appear to have exercised proper supervision over this mate. There is, however, I am sorry to believe, a great deal of falsehood in the testimony of the crew; and, from what I may have occasion to say hereafter, it is possible that my present view of this part of the case may be more unfavorable to the master than it should be.

At Loando the sickly season was begun or approaching; there were no facilities for getting another crew; the captain was without funds, and had neither means nor credit to obtain them there in cash. If it had been a place where a new crew could have been shipped, the incompatibility of a proper future state of discipline on board, with very probable future consequences of past and existing relations between the officers and crew, may have been such as to have required, or justified, the discharge of the crew. This might have been so independently of what might otherwise have been deemed the merits of their controversy with the master. But as the difficulties of obtaining a new crew at Loando were insuperable, necessity, which has its own law, required that the vessel should in some way be enabled to reach Bahia. At Bahia a crew could have been obtained without difficulty; and there the master, whether he had a letter of credit or not, could have obtained ample funds upon the rich freight which he deposes could have been engaged.

At Loando the crew absolutely refused to do any duty until the case should be investigated by the consul; and it was accordingly investigated by him upon their complaint. He seems to have disregarded in a great measure, while they took the fullest advantage of, the local difficulties which have been mentioned. I do not doubt that he acted with a conscientious desire to perform his duty, according to his conception of it. But the proceeding before him seems to have been rather an ex parte inquisition than a hearing of a case referred by parties to his arbitrament. The witnesses do not appear to have been confronted with the master, and no sufficient opportunity for putting questions to them appears to have been given to him.

I do not think that he properly insisted upon having such

an opportunity. But I think that the consul should, for the sake of justice, have seen that it was afforded.

Upon a comparison of the depositions of the crew before him, with their subsequent examination here, the contradictions are so numerous and so material that it is now difficult, if not impossible, to credit their testimony on any precise points. But it appears to have been implicitly believed by the consul without the slightest qualification.

It is true that he received afterwards in like manner the ex parte statements of the master and of the first mate. I do not impute partiality to the consul, but the manner in which he made this investigation was such as might prejudice unjustly his mind.

In these litigations, the difficulty of ascertaining the truth of what has occurred on shipboard is almost always very great. Sometimes it is to be surmounted only through extended cross-examination, especially where the testimony of examinants has been preconcerted, as, unfortunately, is too often the case.

The consul, as I have already intimated, appears not to have been aware of any such difficulty. His decision sustains the crew in every respect, so far as the opinion of a consular officer abroad can ever be decisive. If this had been a consular award under an ordinary arbitrament in a controversy between a master and his crew, I would have been very unwilling to question the decision, though, of course, it would not have been absolutely conclusive.

On October 7th, 1867, the consul announced his decision. It was that the crew, twelve in number, should be discharged for what he thought barbarous treatment on the outward voyage, especially in the river Delaware, and that they should receive full wages, and additional wages for three months, according to his view of the act of Congress. He gave notice to the captain-general not to let the vessel leave without previous payment by the master of the wages, etc., and the consular charges. The captain-general gave orders accordingly to detain the vessel. There is no evidence that the master made any application to the captain-general, or to any of the local

authorities, for a revision, reconsideration or qualification of this order.

I cannot adopt the consul's opinion of the rights of the crew to anything like the extent to which he went, nor can I approve of his disregard of the embarrassments in which the vessel was placed. On the other hand, I do not agree with the respondents' counsel that the master of the vessel, by adopting proper measures, would, after the consul's award, have had any insuperable difficulty in getting the vessel to Bahia.

The consul, on the 18th of November, wrote to the master in these words: "When you have complied with my demands, I could undoubtedly procure from the Portuguese corvette men enough to take your ship to Bahia." This offer the master did not accept for the reason, as alleged, that he had no funds at Loando to enable him to meet the consul's demand. I have already expressed my belief that no such funds were obtainable there. But I repeat that I also believe there would have been no difficulty whatever in getting them at Bahia.

The master offered to the consul a draft on the owners at Philadelphia, which offer was not accepted; nor should it have been, if the money was rightly demandable, because the more proper place of payment was Bahia. Subsequently the consul proposed to defer the payment, certainly of a part of the amount, until the return of the vessel to the United States, and until a decision here upon the merits of the controversy.

I am not quite certain that this is not too narrow a view of the import or tendency of his offer. At all events, I have little doubt that if the master of the vessel had responded to the overture in any spirit of concession, an arrangement could have been made for thus deferring payment of the whole amount, if he had proposed it.

However this may have been, the proper course, in order to get his vessel away, was to arrange matters (under protest, of course,) for payment at Bahia. This he does not appear to have suggested or even thought of.

The consequences of all these unfortunate acts and omissions, and of others, was the loss of the intended voyage,

through a delay at Loando till 25th of March, when the crew, having been reinforced by a detachment from the United States ship of war Swatara, were again shipped in the Cummings, which vessel returned to her home port.

The outward voyage occupied eighty-two days, the homeward fifty-one days. The men were thus in the actual service of the vessel for about four and a half months. They earned wages to be credited or paid to them for this period, less the advance of two months' wages.

For the three months' wages under the act of Congress, awarded by the consul, no demand is, or could be, made.

The controversy is twofold: first, as to wages for the time of detention at Loando; secondly, as to the liability of the crew for a set-off in damages for an alleged loss of freight on the intended voyage which was broken up.

On the first question, I consider the crew to have been out of the service of the vessel from the time, in September, when they refused to perform duty at Loando, and when laborers from the shore were employed to unlade her, to the time of reshipment in March. This reshipment of the crew I consider, in view of the peculiar circumstances of this extraordinary case, to have been made, in effect, under a new contract. I think that the false statements of these men to the consul were the principal cause of the difficulties which occurred. In adopting an opinion different from his, I do not think them entitled to any wages which they did not earn on board.

Secondly, I disallow the demand against them for the loss of the freight which would have been obtainable at Bahia for the ulterior voyage, originally intended, and for the loss from detention of the vessel at Loando. I have already said that however they may have been in fault, their misconduct did not render it in fact impossible for the vessel to reach Bahia; and though their misconduct may have caused some unavoidable delay of the vessel, mariners are not treated on questions of demurrage as parties to a contract of affreightment.

My decision against the mariners on other points makes their case perhaps one of some hardship. I will not increase it in

the manner suggested. How far the decision of the consul, though it might be subject to revision here, furnished in fact, if not of right, the provisional or temporary rule of conduct for all parties at Loando, it is not necessary to decide.

I think the case one for full costs, however small the amounts awarded in proportion to those demanded.

A balance of $62.50, with interest, is due to each of the libellants, except those with whom a settlement has been made since the commencement of the proceedings.

Decree accordingly, with costs.

DISTRICT COURT. JUNE 7, 1870.

ADMIRALTY.

CAFIERO *v.* WELSH.

Deduction, as for short delivery of cargo, from amount due as freight, is not allowed where, upon the evidence it appears that the cargo actually shipped, less unavoidable wastage, was delivered on arrival; and where, although there was an extraordinary deficiency, the master did not assume the responsibility of a carrier before the shipment.

THIS was a cause of affreightment. The bill of lading contained a memorandum of weight and quantity of brimstone in excess of that delivered to the consignees. Among other averments the libel set forth that the brimstone was sent off by the charterers in lighters furnished by the shippers and transferred to the hold of the brig in baskets without being weighed on board, which from the manner of shipping there was no opportunity of doing.

CADWALADER, J.

The brimstone appears to have been weighed for private owners, under official supervision, and the custom house weight, thus ascertained, to have been adopted by the master of the vessel as correct. The bill of lading was not subscribed with reference to the quantity received in the vessel otherwise than upon the assumption that the quantity previously

weighed on land was actually shipped. The transportation by hand, from the place of weighing to the shore, two miles from the vessel, and from the shore, in lighters, to the vessel was attended with great danger of partial loss by pilfering or wastage, or both.

There is no reason, upon the evidence, to doubt that all the brimstone actually shipped, less unavoidable wastage on the voyage and in unloading, was delivered on arrival. If there was a deficiency beyond that occasioned by unavoidable wastage, the cause must have been fraudulent abstraction, careless handling or negligent loss between the place of weighing and the reception on board from the lighters.

According to the uncontradicted testimony for the respondents, the deficiency is greater than can be referable to ordinary wastage as the cause. If there had been such evidence to the contrary as was adduced in the case reported in Abbott, 115, 118, I would have given ready credence to it, and would have decided the case accordingly. If a reference to a commissioner on this point had been desired for the libellants I would have made it. But this was not desired. I must, therefore, assume that there was an extraordinary deficiency, caused by something unknown which occurred between the weighing and the shipment.

Unless the master assumed the responsibility of a carrier, before the actual shipment on board, the vessel is not answerable. The fact that he employed neither the laborers who carried the brimstone to the shore, nor the lighters which shipped it, would, under ordinary circumstances, be conclusive that his responsibility did not begin till the actual shipment.

I was at first very doubtful whether the ordinary effect of payment by the shipper of the charges for such labor and lighterage was not, in this case, neutralized because the bill of lading was apparently subscribed with reference to a previous reception of the brimstone by the master. But this doubt is, on reflection, removed on general reasons, and on the special reason that the meagreness of the account of the transactions in Italy given by witnesses who had every means of knowledge

ought, in this case, to exclude presumptions out of the usual course of judicial inference.

Decree for the libellants.

The decree was affirmed by the Circuit Court.

DISTRICT COURT NOVEMBER 8, 1870.

ADMIRALTY.

VAN NAME *v.* THE SCOTTISH BRIDE.

In ordinary cases the absence of conformity to legislative provisions intended to secure safety in navigation precludes judicial speculation as to how far such want of conformity was the cause of the collision. But it may be disregarded in peculiar cases where the causes of the disaster were wholly independent.

COLLISION.

CADWALADER, J.

I adopt the report of the assessors on the question whether the Scottish Bride (a barque) was in fault, her speed in approaching her intended anchorage at the breakwater having been imprudently great, and her lookout insufficient for such a case, if not for an ordinary case.

On the question whether the Anthony Kelly was in fault, I am of the opinion that she was; her lantern having, in dimensions and form, been different from the requirements of the act of Congress. The question as to this vessel, therefore, is reduced to the point whether her fault was contributory to the occurrence of the disaster. Unless it has been clearly made out that her fault was not thus contributory, the damages must according to the course of procedure in maritime tribunals, be divided equally between the two vessels.

'n an ordinary case, we would not be at liberty to speculate icially upon the question, whether, if the lantern had been ıformable to the requirements of the act, if would have n discerned, or discernible, in time to have probably pre- ıted the collision. It is not in general, enough that, as assessors express it, the light would have been discern-

ible "at the distance of a quarter or a third of a mile which, is a space sufficient to perform any nautical evolution in" or would, at this distance, have shown "equally well for all practical purposes as the eight-inch globular lantern." The act requires a lantern discernible at the distance of a mile; and I repeat that, in an ordinary case, the want of such a light cannot be excused on any conjecture that the disaster would have occurred though there had been one.

But the present is altogether a peculiar case. There was a great number of lights visible, and at the distance mentioned in the act of Congress, the course of speed of the Scottish Bride, could not have been determinable with a view to any one light. Such a determination of her movement must have been postponed until she came within the distance of the gap of the breakwater from her intended anchorage. Relatively to such a case, the conclusion of the assessors may be safely adopted. The distance was then "a quarter or a third of a mile"; and at such a distance the non-conformity of the light cannot have been contributory to the collision.

Decree for the libellants, with costs.

DISTRICT COURT. FEBRUARY 13, 1871.

ADMIRALTY.

THE DELAWARE RIVER STORAGE COMPANY AND THE PHILADELPHIA PETROLEUM STORAGE COMPANY *v.* THE THOMAS.

There is no maritime lien for wharfage. The common-law lien of a wharfinger distinguished.

LIBEL for wharfage.

The libellants were the lessees of a certain wharf on the Delaware River. The respondent, a maritime vessel, a barque, moored at the wharf on the the 31st December, 1870, and remained until the 3d January, 1871; and again from the 6th February until 13th February, 1871. The claim was for $154,

for which it was contended that a lien existed upon the vessel under the maritime law.

J. Warren Coulston, for libellants.

The libel was filed February 13, 1871. On the same day the following opinion was filed:

CADWALADER, J.

This libel is not allowed. The supposition that there is a maritime lien for wharfage has arisen from a misunderstanding of cases in which the common-law lien of a wharfinger has been enforced in admiralty courts after the sale of a vessel under their jurisdiction in other proceedings.

There is no maritime lien in aid of a conventional right to wharfage. (See Newberry, 555.)

The common-law lien is an effectual protection of the wharfinger if he properly watches his wharf. But in certain cases of tortious or actually fraudulent withdrawal of a vessel, I have granted process against her —when unmoored—as for a maritime tort. If such cases depended upon the conventional right alone, process ought not to have been granted. Perhaps it ought not to have been awarded. No such case ever went to a decree. But there is no such question here.

NOTE.—On appeal the Circuit Court sustained this decision.

DISTRICT COURT. MARCH 10, 1871.

ADMIRALTY.

JACKSON *v.* THE STEAM TUG ADELIA.

Measure of damages in case of collision.

COLLISION.

CADWALADER, J.

The Court is of opinion that as the barge, when raised, was a mere wreck, the fair measure of damages may be different from that in ordinary cases of raised vessels. There can be

no rightful analogy to cases in which the actual damages are the cost of reparation. Nor is there any rightful analogy to the case of abandonment. There can be no question of abandonment. I think, however, that here the fair measure of damages was the market value of the barge at the time of the collision, say $4,000, less the value of the wreck when raised, as tested by the resale for $1,000. To this difference there should be added the cost of raising the wreck, $256, and the detention for the time of raising it, $150, making the actual loss $3,406, and loss of outfit $300, total $3,706, with interest from the time of raising the wreck.

Decree accordingly, with costs.

DISTRICT COURT. SEPTEMBER 26, 1871.

HABEAS CORPUS.

CASE OF LOUIS C. ROSENBERG.

The courts of the United States have no jurisdiction in cases of habeas corpus, except where the granting of the writ may be necessary for the exercise of some jurisdiction which has been legislatively conferred; or where the person is in custody under or by color of the authority of the United States. Therefore, a petition alleging wrongful detention in an insane asylum in Pennsylvaniaa of one who is a citizen of another State cannot be entertained.

PETITION for habeas corpus *ex rel.* Louis C. Rosenberg, directed to Thomas S. Kirkbride.

CADWALADER, J.

This petition, though dated on the 29th of last month, is received this morning, in an envelope, postmarked this day. The petition, which is unsworn, alleges a wrongful detention in the Pennsylvania Hospital for the Insane. The want of an oath may, therefore, be disregarded, and the petition considered as a sworn one. It candidly mentions a former hear-

ing under a writ of habeas corpus before a judge of the State court for this county. The recommitment under that writ does not preclude a renewed investigation before the same judge, or any other one of the same court, or any judge of the Supreme Court of the State; and would not prevent the granting by me of the writ now asked if I had jurisdiction of the case.

In considering the question of jurisdiction, I observe that the petitioner is a citizen of the State of Ohio, and that the alleged wrongful custodian is a citizen of Pennsylvania. The citizenship, it is true, is not formally averred; but the petition would, in this respect, be amendable, as of course; and I will consider it as if already amended.

The controversy would, by reason of the citizenship of the parties, be cognizable by me, not as Judge of the District Court, but as a Judge of the Circuit Court, if it were a suit "of a civil nature . . . where the matter in dispute exceeds . . . the sum or value of $500." But the proceeding, though a "suit of a civil nature," is not one to which the pecuniary standard of this definition as to amount or value can be applied.

The question of jurisdiction depends, therefore, upon the special provisions of the judiciary act as to the writ of habeas corpus. The judiciary act enables me to grant such a writ only in cases in which it may be necessary for the exercise of some other jurisdiction which has been legislatively conferred, or where the person detained is in custody under or by color of the authority of the United States.

I have, therefore, no jurisdiction to grant the writ.

The clerk of the court will send a copy of the above to Mr. Rosenberg, and another copy to Dr. Kirkbride.

SEPTEMBER 28, 1871.

OF THE STATE OF NEW
AND OTHERS, CITIZENS
PENNSYLVANIA, COMMIS-
CONSTRUCTION OF CER-
LDINGS IN PHILADELPHIA.

of Pennsylvania of 5th August, 1870, con-
the erection of public buildings in the city of
the choice of their location to a vote of the
the city, is not unconstitutional.

junction.

ATEMENT OF THE CASE.

ought to restrain the commissioners named in the
mbly of the State of Pennsylvania of 5th March,
proceeding with the erection of public buildings
of Philadelphia. It was a local question of some
le, and strong differences of opinion existed with
the suitability of respective sites, viz.: Washington
and Penn Squares, and the propriety of a legislative
of power to any body of men for a purpose so purely
and municipal. As provided for by the act, the question
cation was submitted to the vote of the citizens and
lted in the choice of Penn Squares by a large majority.
is bill was afterwards filed by a citizen of New York, owning
operty in Philadelphia, and raised the question of the con-
stitutionality of the act. The points on which the argument
rested are briefly and distinctly stated in the opinion of the
Court and preclude elaboration. For the proper understand-
ing of the case, however, it may be added that the bill averred
that the act was so contrived as, in fact, to compel votes in
favor of erection on Penn Squares by the contingent donation
of them to private corporations in the event of their not being

chosen as the site for the buildings, and thus availed itself of the known public opposition to that project; that in this and other respects the Legislature adjusted the provisions of the act to differences of opinion among the voters with a view to a kind of bargain in votes; that the giving away of the Penn Squares as contingently provided for was *ultra vires,* they having been originally dedicated to public use, and involved a breach of the obligation of contracts. It was also alleged that the act, in its effort to provide for several objects, whatever the motive, became void under the amendment to the Constitution of Pennsylvania of 1864, which requires that every bill, except appropriation bills, shall contain only one subject, which shall be clearly expressed in the title. The subjects here were three: 1. The construction of public buildings by commissioners on either Penn or Washington Squares, whichever should be selected by the vote of the legally qualified voters. 2. The removal of all buildings except Independence Hall from Independence Square as soon as said new buildings should be ready for occupation, and the dedication of said square thereafter as a public walk and green forever. 3. The contingent donation of Penn Squares to four private corporations. The bill further complained that one of these subjects, to wit, the second, is not mentioned in the title of the act or referred to in any manner.

The preamble to the act is as follows:

"To provide for the erection of all the public buildings required to accommodate the courts and for all municipal purposes in the city of Philadelphia, and to require the appropriation by said city of Penn Squares, at Broad and Market streets, to the Academy of Fine Arts, the Academy of Natural Sciences, the Franklin Institute and the Philadelphia Library, in the event of the said squares not being selected by a vote of the people as the site of the public buildings for the said city."

Wm. Henry Rawle, E. Spencer Miller and *George W. Biddle,* for complainants.

Charles H. T. Collis, City Solicitor, for defendants.

At the close of the argument before CADWALADER, J., the injunction prayed for was refused. On the next day the following opinion was filed:

CADWALADER, J.

Constitutional power, and especially legislative power, may be greatly abused, where it is neither usurped nor exceeded. In such a case the only remedy is legislative repeal. Judicial redress cannot be invoked.

The constitutionality of the act of the legislature is disputed on the grounds that: 1. It is a violation of the constitutional amendment of 1864, which prohibits the enactment of a law containing more than one subject, and requires that such subject be clearly expressed in the title. 2. It violates the provision of the Constitution of the United States prohibiting State legislation impairing the obligation of contracts, and the provision of the Constitution of the State in nearly the same words. 3. The provision for what was to have been done if Washington Square had been selected by a majority of votes for the location of the buildings was, in effect, a delegation of legislative power.

1. On the first point it suffices to observe that the subject was a compound one involving alternatives mutually dependent or consequential. The title specifies all the purposes of the act except one, which is directly consequential. If such a law is unconstitutional, the question is not so clear that it should be decided by a single judge at an interlocutory hearing.

2. The argument under the second head is, that Penn Square having been dedicated by Mr. Penn, the former proprietary, to general public use, the Legislature could not constitutionally modify the grant. The proprietary certainly could not have resumed, abrogated or modified it. Under the frame of government of 1701 all powers of legislation were vested in the Provincial Assembly. That body could, I think, have modified the beneficial use by such an act as that in question. The argument is, that under the Constitution the legislature of a State could not do so. I am of a different opinion. The dedication

to general public use did not preclude such legislation. Whatever may have been decided in one or two other States, neither the decisions of the Supreme Court of the United States nor those of the Supreme Court of Pennsylvania support the argument.

3. As the contingency of the selection of Washington Square did not become absolute, the argument that it was inseparably connected with the legislative provisions which took effect is a very refined one, perhaps too refined. I am, however, of opinion that the question of the allotment of Penn Squares to the purposes contingently specified in the act was not unconstitutionally left to a local vote.

DISTRICT COURT. SEPTEMBER 30, 1871.

ADMIRALTY.

ABBOTT *v.* THE L. AND M. REED.

1. In a cause of possession averments of names of owners and extent and nature of ownership are required in the libel.

2. Notwithstanding that libellants may have a majority in interest, the court will allow part owners in possession to retain a limited possession, where the libel admits that the intention of the libellants is to employ the vessel to the exclusion of other owners.

LIBEL in a cause of possession.

CADWALADER, J.

1871, September 30. Mr. Flanders, yesterday presented the libel, as originally drafted, when I thought it insufficient for the awarding of the process in rem, and insufficient even for the awarding of a citation in personam. I thought that upon a supplemental allegation setting forth the names of all owners not originally named, the citation in personam might issue, though not process in rem. The libel was so endorsed with a provisional judicial order. The libellants, by the amendment or supplemental allegation, beginning with the words, "And the libellants further allege" complied with the condition imposed by the above mentioned provisional order. and very properly went further, supplying all the omissions which had originally made me refuse to award process in rem.

I am ready to award such process now if they ask it, and, if necessary for the immediate purposes of justice, to consider it awarded as they originally prayed for it.

In the meantime, the defendants, without awaiting the return of the citation, appear; and as I understand, submit themselves to the jurisdiction of the court.

The libellants insist that as a majority in interest they are entitled to control the employment of the vessel (a schooner). I am of opinion that this will be so, if they shall appear to be such majority, and no special extraordinary reason to the contrary shall appear.

In the meantime each party offers to give security, and asks to be allowed to employ the vessel for the present.

I am of opinion that the libellants would have the preference, if they were not, by the admissions of their libel, parties out of possession whose desire to employ the vessel to the exclusion of the other owners is of such recent origin that some suspension of the enforcement of this right is reasonably asked on the other side.

The defendants offer to give security for the return of the vessel to this port within one month, and for the deposit of her papers within that time in the registry of the court, without prejudice to any right, or contestation, etc.

Should they not be allowed on these conditions to retain the possession for one month?

I think so. The vessel will therefore be liberated from the jurisdiction of the court on security approved by the clerk being given by the defendants conditioned as above.

DISTRICT COURT. NOVEMBER 25, 1871.

CONTRACTS.

THE UNITED STATES *v.* JAY COOKE & COMPANY.

An officer of the United States paid a draft upon a forged signature, and more than six years afterwards suit was brought to recover the same from the banker who had innocently collected the same: *Held*, that the action was not sustainable.

ACTION OF ASSUMPSIT tried before

CADWALADER, J.

The facts were these: An individual representing himself to be Charles M. Colton, Assistant Surgeon U. S. Army, placed in the hands of Ira B. M'Vay & Co., bankers of Pittsburgh, a pay roll for collection, which M'Vay & Co. sent to Jay Cooke & Co., at Philadelphia. The latter firm received the money from Paymaster Riche, June 24th, 1863, transmitted it to M'Vay & Co., who paid it over to the supposed Colton. The order attached to the pay roll and the endorsement were as follows:

"Paymaster Major Taggart, U. S. Army, will please pay to Messrs. Ira B. M'Vay & Co., or order, the amount of the within roll.

"CHARLES M. COLTON,
"Assistant Surgeon U. S. A.

"Pay to Jay Cooke & Co., or order.

"IRA B. M'VAY & Co.

"JAY COOKE & Co."

Sometime in the year 1869 it was discovered that the signature of Charles M. Colton was a forgery, and November 6th, 1869, suit was brought against Jay Cooke & Co. by the United States, to recover the amount of the pay roll.

On the trial the learned judge charged the jury that the fact of the forgery was fully established, but that the case did not differ from the familiar one where an individual paid a cheque on the faith of the signature of the drawer, which subsequently proved to be a forgery. Under the directions of the Court the jury rendered a verdict for the defendants.

The counsel for the United States, having moved for a new trial, were heard January 16th, 1872, when the learned judge said that there were several interesting points in the case which might be discussed, but it was only necessary to say that the delay of more than six years which had elapsed was fatal to the claim of the United States—that all the cases required

the utmost diligence on the part of the drawee, a diligence analogous to that required in giving notice of the dishonor of commercial paper. In this case, had an individual been the plaintiff, the action would have been barred by the statute of limitations. He therefore refused the motion for a new trial.

DISTRICT COURT JANUARY 19, 1872.

ADMIRALTY.

THE JULIET C. CLARK *v.* S. AND W. WELSH.

Freight should be allowed upon a cargo which had been destroyed, where, upon an interpretation of the contract with reference to the subject, the only method of obtaining a certain hire for the vessel is to estimate the freight as if every cask were full.

LIBEL for freight.

THE vessel was chartered by S. & W. Welsh, for a voyage from Philadelphia to Trinidad de Cuba and return. By the charter party it was agreed that the vessel was to be provided for the outward voyage with a full cargo of sufficient ballast, and for the homeward voyage a full under deck cargo of sugar or molasses, or both, and the charterers were to pay to the vessel "for outward cargo all foreign port charges at Trinidad, and for homeward cargo forty-six cents for each one hundred pounds of sugar nett custom house weight, and, (or) four and three-eighths dollars for each one hundred and ten gallons, gross custom house gauge, of cask, of molasses delivered, in American gold coin."

The charterers put on board a cargo of staves, etc., and the outward bound voyage was made in safety, and the vessel received her homeward cargo.

On the return voyage, the between deck cargo was forced from its original stowage and a number of the hogsheads were emptied and several of them were broken. Twenty-eight hogsheads (two of them in the lower hold) had lost all of their contents, and fifty-four hogsheads were "in staves."

The respondents were unwilling to pay freight on the empty and broken hogsheads, and this action was brought to recover freight on the entire cargo.

Lane & Roney, for libellant; *John Fallon,* for respondents.

CADWALADER, J.

The interpretation of the contract is to be made with reference to its peculiar subject. The argument for the respondents does not, in this respect, meet the exigency of the question. The question was argued as if molasses were merely to be considered as a liquid liable to extraordinary leakage from fermentation, and the casks were to be considered as merely liable to the consequent loss of contents. This argument overlooks the fact that, in consequence of the liability to such fermentation, the casks were carried by sea with their bungs out. The effect of the voyage is ordinarily, to empty many of them, and it is known, from experience, that, without any extraordinary stress of weather, casks are often turned with the bungs downward, and that when this occurs the position is very seldom, if ever, righted.

The only way, therefore, of obtaining a certain hire for the vessel carrying such a cargo is that which was adopted in this contract; that is to estimate the freight as if every cask were full, applying the measure to casks which are quite empty as well as to those which are partially so. That this was the purpose of the contract cannot be doubted when the words are properly applied. From a manuscript report of a case before Judge Ware he may be supposed to have decreed full freight upon such an estimate where a loss of the whole contents had occurred from extraordinary perils of the sea. If such were the question here I might perhaps pause before deciding it. But here the loss of contents occurred from no such extraordinary cause.

Decree for libellant with costs.

DISTRICT COURT. AUGUST 3, 1872.

ADMIRALTY.

THE UNITED STATES *v.* THE OHIO: BOYLE, CLAIMANT.

1. A laden boat, which, having no sail, oars, or other motive power of its own, is drawn, by horses, through a canal, and from thence, through navigable waters of the United States, by a steamer, to a market, is not within the description of a ship or vessel in the act of Congress of 18th February, 1793, "for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."

2. The applicability of the act is not, in this respect, enlarged or altered by the act of 20th of July, 1846, exempting such canal boats without masts or steam power as were then by law required to be registered, licensed, or enrolled and licensed, from hospital dues and from official fees, etc.—or by the tonnage measurement act of the 6th of May, 1864—or by any other legislation of Congress in which the phrase *vessel,* or *ships and vessels,* may have been variously defined or applied.

LIBEL for the recovery of fees and tonnage dues, upon a vessel not enrolled and licensed as if she belonged to parties not citizens of the United States.

The answer set forth in substance that the vessel was what is known as a canal boat, and, as such, was furnished with no propelling power, carried no return freight or cargo, and was not a trading vessel within the meaning of the act of Congress of 18th February, 1793.

STATEMENT OF THE CASE.

The following are the principal sections of the act of Congress of February 18, 1793 (1 Ll. U. S. 305), which have been cited with reference to the proceedings in this suit:—

SECTION 1. "That ships or vessels, enrolled by virtue of 'an act for registering and clearing vessels, regulating the coasting trade, and for other purposes' and those of twenty tons and upwards, which shall be enrolled after the last day of May next, in pursuance of this act, and having a license in force, or if less than twenty tons not being enrolled, shall have a

license in force as is hereinafter required, and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries."

SEC. 37. "That nothing in this act shall be construed to extend to any boat or lighter not being masted, or, if masted and not decked. employed in the harbor of any town or city."

SEC. 6. "That after the last day of May next, every ship or vessel of twenty tons or upwards (other than such as are registered) found trading between district and district, or between different places in the same district, or carrying on the fishery, without being enrolled and licensed, or if less than twenty tons, and not less than five tons, without a license, in manner as is provided by this act, such ship or vessel, if laden with goods, the growth or manufacture of the United States only, (distilled spirits excepted), or in ballast, shall pay the same fees and tonnage in every port in the United States at which she might arrive, as ships or vessels not belonging to a citizen or citizens of the United States; and if she have on board any articles of foreign growth or manufacture, or distilled spirits, other than sea stores, the ship or vessel, together with her tackle apparel and furniture, and the lading found on board, shall be forfeited. Provided, however, if such ship or vessel be at sea, at the expiration of the time for which the license was given, and the master of such ship or vessel shall swear or affirm that such was the case, and shall within forty-eight hours after his arrival deliver to the collector of the district in which he shall first arrive, the license which shall have expired, the forfeiture aforesaid shall not be incurred, nor shall the ship or vessel be liable to pay the fees and tonnage aforesaid."

The boat libelled was not registered, or enrolled and licensed, or licensed. The purpose of the libel was to enforce the payment of the fees and tonnage dues which would have been payable if the boat were a foreign vessel.

The boat was of a kind which, in one of the opinions quoted below, was described as follows:

"The boats in question are of a peculiar character, not corresponding closely, or in any other than a most general way, with any other description of water-borne vessel. They are vessels in one sense, because they are things which can and do contain coal, and are moved upon the water; but for substantive and independent use, they do not come within the popular notion of ship or vessel, any more than any other water-tight box would. They are a mere capacity of holding and floating, and being pulled by an external power, and nothing more.

"When the boat is passing through a lock, it is a box about 42 feet long, 10 feet wide, and 4½ to 5 feet deep. A running board of about one foot wide extends along each side and across one end to form a passageway for the hands. At the other end there is a platform planked over for about eight feet in extent, to furnish accommodation to persons employed aboard, and to strengthen the work. The coal within is exposed to view, there being no deck, nor hatches, constituting a temporary or occasional deck.

"When two or more sections of the same description have passed the lock and come into the canal or river, they are connected end to end by hinges and are moved in this connection together.

"On a canal they are moved by one or more horses or mules on the towing path of the canal. In a river they are moved by a steam tug. A man and two boys, or a woman in the place of one of the boys, are the working hands, the horse or mule being ridden or driven by a boy, and the man and woman or the other boy remaining on board. When attached to the steam tug the horses or mules are commonly taken on board the tug, and the operatives are without employment until the horse or mule begins the work of towing in the canal. The vessel or boat, call it by what name is thought best, has no moving power within itself, nor can it be moved otherwise than in the mode thus described. On a canal, a horse or mule, or some other animal power, is indispensable, to give it the capacity to transport anything. On a river, a steam tug, or

a vessel that has a moving power within itself, is as necessary to give the boat the capacity to transport anything, as the animal power is on the towing path of a canal. The boat has, from its being water-tight, capacity to contain coal or anything else on the water without sinking; but of itself, or by virtue of any machinery, whether mast and sail, or anything else, it has no capacity whatever to carry or transport anything; and when it is on a river or open water, it must be attached to a vessel that has a mast and sail, or machinery for motion, and it is only as an appurtenance to such a vessel for the time being, that has any practical use in transportation."

Such boats, having first come into use long after the commencement of the present century, a question which arose in 1845, and has never been decided, was, whether they were vessels within the meaning and application of the act of 1793.

In May, 1845, the President of the Lehigh Coal & Navigation Company, and certain officers of other canal companies, addressed letters to the Hon. Robert J. Walker, then Secretary of the Treasury, saying that their business was threatened with serious interruption from the proposed application to their scow-boats employed in the transportation of coal of the provisions of the Act of 1793. They contended that the act did not apply to their boats, which could not with any propriety be considered as "ships or vessels" within the meaning of the act; which are navigated by persons without the slightest pretensions to the character of "seamen;" which are not engaged in the "coasting trade;" which are incapable of being employed without immediate detection in any attempt to evade the revenue laws; which have no masts, and were not in existence or use at the time of the passage of the act.

Accompanying these communications were the following opinions of counsel.

The first of them, after giving the description of the boats as above, proceeded:

"If the question, whether such a boat is within the Act of 18th of February, 1793, were to be decided by the fact of there having, or not having, been a particular intention to include it,

there could be no doubt that it is not within the act, because there could have been no particular intention to include a description of vessel, which, at the date of the law had no existence. Neither canals, nor canal boats, were at that time, or for many years afterwards, known in the country. The boats and the mode of pulling them in an open river or bay, are altogether of subsequent invention or adoption. But this consideration is by no means decisive of their not being embraced by the Enrolment Act of 1793. No new variety of structure of boat or vessel can be deemed exempt from the operation of the law, if the general intent and provisions of the law embrace it, merely upon the ground that there was no particular intention to comprehend it. If such boats are within the general scope of the Enrolment and License Act, they will be comprehended by it, notwithstanding they are of recent invention and use. The general scope of the act is first to be ascertained. If that is so broad as to comprehend every species of vessel that is water-borne, and is capable of holding cargo, and of being moved by the power of another boat, then there is no ground for exempting from its operation the boats or vessels above described, since they are water-borne, and are capable of containing cargo, and are so moved. But if the scope of the act is narrower than this, and only comprehends ships or vessels of certain characteristics, then the inquiry will be, whether these canal boats have the requisite characteristics.

"The first head of inquiry then is, whether such boats are *entitled* to be enrolled and licensed under that act, and to enjoy the privileges of ships and vessels employed in the coasting trade and fisheries.

"The Act of 1793 does not *expressly* require that ships and vessels to be included within it, shall have a particular character, and that if they have not, they shall be excluded. It requires affirmative qualifications, and if any kind of water-borne vessel is excluded, it is by *implication*, and not by express terms.

"Its first provision in its first section is, that ships and vessels enrolled and licensed, or if less than twenty tons, having a license in force, and *no others*, shall be deemed ships or vessels

of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries.

"There is nothing in any subsequent part of the act which repeals or impairs the force of this enactment in regard to any description of vessel whatever. If a vessel is not enrolled and licensed, or if of less than twenty tons, is not licensed, she is not a ship or vessel entitled to the privileges of ships or vessels employed in the coasting trade or fisheries. What the consequences are which arise from her not having those privileges, must be ascertained from other parts of the act; but it is clear that enrolment and license are indispensable to confer those privileges. No ship or vessel indeed is, by force of anything in the act, compelled to take out an enrolment and license. She is free to go without it, or without any papers at all, if she does not claim to exercise the privileges of an enrolled and licensed vessel. But if she is found doing certain things mentioned in the 6th section, without an enrolment and license, then she is acting in violation of the law, and the penalty prescribed by the law attaches, if she and her acts and doings come within the description in that section.

"Although there is no express exclusion by the act of any vessel from the benefit of enrolment, it is nevertheless true that the 2d section of the act does prescribe certain qualifications and requisites, without which a ship or vessel cannot be enrolled or licensed. That section is explicit in requiring that for the enrolment of any ship or vessel, she *shall* have the same qualifications, and the same requisites in all respects shall be complied with, which are made necessary by the act entitled, an act concerning the registering and recording ships or vessels, passed the 31st December, 1793; and without enumerating all of them, there are some which may be referred to as being necessarily confined to vessels of a certain description, and not applicable to such a kind of boat as is used for the transportation of coal upon canals, and is hereinbefore described.

"The carpenter's certificate may first be referred to as setting out what the law regards as the general, or rather uni-

versal, description of every ship or vessel that is entitled to enrolment and license. It must set forth, besides other particulars, the *number of her decks and masts*, her length, breadth, depth, and *tonnage*. There are others, but these are the only qualifications stated in the carpenter's certificate, which it is necessary to refer to.

"They may be regarded as descriptive merely, or required only for the purpose of identification; and doubtless they are so in part; but as regards one of these qualifications, that of a *deck*, not only does it necessarily enter into the character of a sea-boat, without which it is wholly out of the question to speak of her as a coaster or as engaged in the sea-fisheries, but it is also a fundamental part of an enrolled ship or vessel,without which the act of Congress cannot be executed in regard to her.

"The rule prescribed for ascertaining her tonnage, necessarily implies that she has at least one deck; for an element in the admeasurement of the tonnage, is the depth of the vessel from the under side of the deck plank to the ceiling in the hold; and if she has no deck, she has no certain tonnage within the law, either to be inserted in the enrolment or to be the basis on which her duties are to be estimated under the law.

"It is quite possible that an arbitrary line may be taken from where the under side of the deck plank would probably be if the boat had one; but that is not within the enactment of the law, nor will it give the tonnage which is the lawful tonnage by which duties are estimated. The lawful tonnage is the tonnage under deck, and if the vessel has no deck, she has no such tonnage. Her tonnage may be what she will carry without sinking the boat, or falling overboard; but that is not the tonnage contemplated by the act of Congress. In fine, the law does not recognize an enrolled *vessel without a deck;* and there is no matter of surprise in this, seeing that it would be preposterous to suppose that the owner of a vessel without a deck would ask for the privileges of the coasting trade, fisheries, etc., which she could not enjoy. Such a vessel wants qualifications that are indispensable to a registry, and they are equally so to enrolment and license.

"The certificate of enrolment, a form of which is given, descriptive in general terms of all vessels that are within the law, and which is accompanied in the act by directions for filling the blanks in the printed form with words descriptive of every vessel that can be properly enrolled, in like manner implies, if it does not more than imply, that the vessel is a decked vessel. It purports that the surveyor has certified that she has at least one deck, for it directs the number of decks to be inserted in a particular blank, and sets forth that the owner or person acting in his behalf has agreed to the description.

"It is possible that in practice a carpenter may certify that the vessel has no deck, and the custom house may fill the blank in the certificate of enrolment accordingly. But if they do, they deviate from the act of Congress, and reject what the act expressly requires, giving the privilege of enrolment to a vessel that Congress has made no provision for, but the contrary. When a deck is wanting, and her tonnage measurement is certified, it is impossible that it should be anything more than conjectural tonnage. It cannot be ascertained according to the rule prescribed by Congress, which is the only rule, and is the effective rule by which, and by which only, her tonnage duty is ascertained.

"Not only the objects of the enrolment law, but its language in many parts do so describe the ships and vessels comprehended by the act, as to show that open boats without the power of navigation in themselves, are not within its provisions, and have not the qualifications necessary for enrolment. When forfeiture is inflicted for trading without a license, or using a forged or altered license, or the license of another vessel, it is inflicted on the ship or vessel with *her tackle, apparel and rniture*. Forfeiture is never inflicted without this descrip-
ɔn of accompaniments of a ship or vessel, in the commercial
nse, being annexed; and it is known that in the law of in-
rance, these words comprehend and cover the sails, yards,
gging, cables, and the like, the accompaniment of not only a
cked, but a masted vessel. Such is the general commercial
port of the words. The words *ship or vessel*, of themselves,

imply, in the ordinary acceptation of merchants and mariners, a vessel competent for the sea. And in an act concerning the coasting trade and the fisheries, this must emphatically be their signification. It is wholly inadmissible to extend them to a scow, or to a boat without a deck, that would be swamped by the ordinary waves of the sea. Such things do not rise to the dignity even of a barge or row boat.

"After a careful examination of all parts of the act, I entertain the opinion that such a boat as is described in the first part of this opinion is not entitled to enrolment. She wants the requisite qualifications. She cannot be *measured* according to law. Her *tonnage*, which means tonnage *under deck*, cannot be ascertained, for she has no deck. She can carry whatever can be put into her without sinking her; but though she has a tonnage *capacity*, she has no tonnage *measurement*. She has no mast and no deck, no power to avail herself of the privileges granted, and it would be preposterous to claim the privileges for her, because, without the aid of another vessel *that is also enrolled*, she could not exercise any of them.

"The 37th section of the act of 18th February, 1793, may be thought to militate against this view. That section enacts that nothing in the act shall be construed to extend to any boat or lighter not being masted, or, if masted and not decked, employed in the harbor of a town or city. It exempts from the operation of *every part of the law* a decked boat without masts, and a masted boat without decks, however employed in the harbor of a town or city. From which it may be inferred that a boat without masts or deck is within the law, and may be enrolled. But I regard this as a misapprehension of the design of that section. Within the harbor of a town or city, such as New York, for instance, and Philadelphia, boats and lighters are necessary for the transportation of merchandise, *foreign* as well as domestic, from place to place, within the same district, and possibly from one district to another. In a large sense, such boats may be regarded as performing an act of trading, as often as they are so employed, and as going from place to place in the same district when they go from New York to

Brooklyn or Staten Island, or from Southwark to Kensington. To prohibit their use in this way would be to deprive the trade of a city of an essential accommodation; and it would be prohibition if they were exposed either to forfeiture or to foreign duties, if found so trading without enrolment and license. The section means, therefore, to exempt boats so employed with masts only, or with decks only, from the operation of the act altogether. It does not imply that such boats, and still less that boats without either masts or decks, are entitled to certificates of enrolment, but it exempts boats with one only of the qualifications, from the penalties of the law, if their employment be thus limited. It implies rather that boats without either masts or decks are not within the act, by excepting boats that are only masted or decked, and not both, as not being within the operation of any part of the act.

"It being clear, then, according to my opinion, that a canal boat such as I have described, is not within the act entitled to enrolment, as wanting the essential qualifications required by law, the next inquiry is, whether such a boat is made incapable by law of the use to which it is applied in the carrying of coal in the manner stated from district to district, or from place to place within the same district.

"And this, it will readily be seen, is a question of great importance; for if such boats have not the legal qualifications for enrolment and license, they cannot be enrolled and licensed; and if without enrolment and license they cannot be used in the manner described, the carrying of coal from Bristol to Philadelphia, or to New York, through the Delaware and Raritan canal, is almost necessarily destroyed, for it can hardly be carried in any other boats. If they cannot carry it, there must be transshipment into an enrolled vessel at Bristol, and if the enrolled vessel cannot pass through the Delaware and Raritan canal, there must be another transshipment at Bordentown, and again at Brunswick. Canals for the transportation of coal may be regarded as almost superseded by the interpretation.

"The impediment to the use of these boats in the manner stated, if found anywhere in the act, is to be found in the 6th

section, which enacts that every ship or vessel of twenty tons and upwards found trading between district and district, or between different places in the same district, without being enrolled or licensed, or if less than twenty and not less than five tons, without a license, if laden with goods the growth or manufacture of the United States, distilled spirits excepted, shall pay the same fees and tonnage in every port of the United States where she may arrive, as ships or vessels not belonging to citizens of the United States; and if she has on board foreign goods, etc., or distilled spirits, *the ship or vessel, together with her tackle, apparel, and furniture,* and the lading found on board, shall be forfeited.

"The force and effect of the prohibition, lie in the words, *every ship or vessel found trading,* etc. The penalty can attach only to such a boat as is a *ship or vessel,* within the meaning of the act, and is *found trading* in the manner restrained or prohibited by the act.

"Now I apprehend, in the first place, that such a canal boat as has been described, is not a ship or vessel in the sense of the act. She has hardly any more of the attributes of a ship or vessel, in either commercial or common language, than a raft of logs on the water. Boards might be placed upon such logs, and coal might be placed upon the boards—and the whole might be moved by the same power that moves such canal boats. The circumstance of the raft's containing or holding coal, and being moved upon the water, would not make it a ship or vessel in the sense of the act, though in a very general sense, it might be regarded as a vessel. The canal boat described is a series or succession of connected boxes, which, whether separate or united at the hinges, is incapable of coasting, either on the sea or in a river, or of being moved by any power within itself. It has no independent or internal capacity whatever, except that of holding the coal. Its practical use, its practical existence indeed, is as an adjunct to something else. It cannot be conceived of as a practical instrument of any kind, except in connection with something external, that is to say, some external animal power on the shore, or some external wind or

stream power on the water. The act cannot be understood by its general language to comprehend such a thing. The policy of the law in regard either to ships or seamen, cannot be understood to embrace such machines as these, or such persons as are employed to drive the horses or mules, or to attend to mere laborers' duty on board. No one interest of either shipping or seamen, can be considered as involved in them.

"But the material consideration remains; and that is a consideration which opens a view of the subject which shows both practically and legally that these boats are never in the predicament which brings on the penalty of the law.

"While they are within the canal, and are towed by a horse, it is understood that, whatever may have been the doubt at one time, it has long been the settled understanding that the enrolment law takes no cognizance of them. It is only when they become an adjunct to a steam tug, that the lawfulness of their employment is questioned.

"It is obvious that the act of Congress, in all its provisions, has reference to separate, unconnected, independent ships or vessels, moved or propelled by a power within themselves, and trading from district to district, or between different places by their own capacity. The ship or vessel is always spoken of in this character. She is represented as the acting, moving, trading, and transgressing body; and no one can doubt that this was the only acceptation in which the words *ship or vessel found trading, from district to district*, could have been received at the passage of the act.

"A scow or boat drawn by another boat, and depending wholly upon it for motion and change of place, is not such a ship or vessel. For all purposes of trading, as well as for change of place, the acting, moving, trading, and transgressing body, is the vessel that moves, and the canal boats only as part of her. If the moving or propelling boat is moving, and trading in violation of law, the penalty is incurred; but if her moving and trading are lawful, the manner in which she transports cargo does not make her trading unlawful.

"If the steam tug herself is not qualified to carry on such

trade from district to district, or between different places in the same district, the law is violated by her. But if she is so qualified, then no offence is committed, for in fact, as well as in law, it is the steam tug that is found trading, and not the boxes or boats that contain the coal. The law regards the ship or vessel as an offending agent—as a body that by her own capacity carries on the trade—and if she is a mere scow or floating box, attached to another vessel that pulls or moves her, her character is lost in that of the moving and acting vessel that carries her along.

"Put the case that a steamboat has a constant attachment to her sides, of two such boats carrying coal or other merchandise—can it be doubted that the steam tug is the trader—and that her papers protect the trade?

"If unlawful trade is carried on with, or from, the boats, can it be doubted that the bond given upon the enrolment of the steamboat, to secure the United States against her being employed in an unlawful trade, is forfeited?

"And it is this that constitutes the security of the government against unlawful trading by such boats; that they are a part, or adjunct of the vessel that navigates them, and as much a part of her as her own boats during the whole voyage, from beginning to end—for they are connected with her from the moment they are attached to her, and are incapable of motion to or from different districts, or different places in the same district, without her.

"If the steam tug is not the vessel found trading, then she would not be so, if she placed merchandise in her own boat, and towed it at her own stern; and if such canal boats are to be regarded as found trading, then the boat of the steam tug, if laden, would be so regarded, and the bond of the steam boat would not be answerable for any unlawful trading with or from the boat. Such a view of the act cannot be defended. There is no law that compels a coaster to carry her cargo in her hold. She may carry it on her deck. She may stow it in her boats on deck. If necessary or convenient, she may tow her boat with cargo in it. Whatever she tows and moves from

district to district, or between different places in the same district, is her trading. If lawful to her, it is lawful to the goods she carries, and to the boats in which they are carried. If unlawful to her, her bond is forfeited.

"Again, unless some distinction is made in behalf of open boats, not decked, in carrying coal from district to district, when drawn by another boat, I know not how the most ordinary intercourse between different districts on the same river is to be carried on. From Bristol, in Pennsylvania, to Burlington, in New Jersey, coal must be transshipped at Bristol, into an enrolled coaster, and carried under deck to Burlington, on the opposite side of the river. I think it cannot be protected in the open boat, under the section which exempts from forfeiture boats employed in the harbor of a city or town. The coal boats are not so employed; and the harbor of Bristol is not the harbor of Burlington—nor vice versa. The evils of the contrary construction seem to be immense.

"After careful consideration of the case, under the acts of Congress, I am of the opinion that the boats in question cannot be legally enrolled and licensed; and that, whether in a canal, pulled by horse or mule, or on tide water, or in an open river or bay, attached to a steam tug which draws them with their loading of coal, they are not in violation of law, nor is the law violated in any way, in their being drawn from district to district, or between different places in the same district, by steam tug, if the steam tug herself is enrolled and licensed to carry on the coasting trade."

HOR. BINNEY.

Philadelphia, May 13, 1845.

"A suggestion has been made by one of the managers of the company, which, as an illustration of part of the preceding opinion, appears to have great force. The penalty under the 6th section for trading with domestic produce, is the payment of the same fees and *tonnage* as ships or vessels not belonging to the United States. But the tonnage is matter of admeasurement depending on a deck. How then can the penalty be applied to an *undecked* boat? This also shows that Congress

did not mean to include such a boat within the prohibition."

HOR. BINNEY.

Philadelphia, May 14, 1845.

"Philadelphia, 14th May, 1845. I fully concur in the foregoing opinion of Mr. Binney.

"J. K. KANE."

"I do not doubt that the floating coal chests or boxes used on the Lehigh and Delaware canals, and particularly described in the opinion of Mr. Binney, would be embraced by the general phrase "*vessel*" employed in the repealed act of Congress of the 1st of September, 1789, and in the subsisting act of the 18th of February, 1793, relating to the coasting trade. Their rough and primitive character, and their being without masts, or decks, or keels, or rudders, could not withdraw them from the comprehensiveness of that term.

"Nor do I doubt that such vessels, *although unprovided with a motive power within themselves*,—being without sails, or steam, or even oars or pushing poles, might, nevertheless, if dragged from one side of a river in one collection district to the other side, and into a different collection district, by means of open wherries or batteaux, or by long ropes, as it is still common with ferry boats or scows, fall within the general scope of those acts of Congress, if otherwise liable to do so.

"Yet, I am clear in the opinion that, by these laws, the enrolment and licensing are mere modes of receiving particular privileges and immunities to certain descriptions of American vessels—not to *all* American vessels—and that these floating coal chests or boxes do not, and really cannot, come up to the requirements on which only they could be entitled to enrolment or license, or be held subject to the fees and tonnage of foreign vessels. These requirements are fully adverted to by Mr. Binney, or I would repeat them."

17th May, 1845. G. M. DALLAS.

Before and after the date of these opinions, canal boats of other kinds, *with motive power of their own*—sails, oars, or

steam—were also used for transporting coal and other cargoes through canals, and from thence, through navigable waters, to market. In the Delaware and Raritan Canal, in 1843, four canal boats with sails, and four others propelled by steam, were thus in use. In the slack water and canal navigation of the Connecticut, small steamers had been previously and were afterwards used; and on the State canals of New York, steamers have since been used. Some of the boats, large and small, drawn by horses through canals, have always been provided with oars for use after leaving the canals. The number of such boats with oars has been reduced since the commencement of the use of steam tugs.

An act of 20th July, 1846 (9 Ll. U. S. 39), "to exempt canal boats from the payment of fees and hospital money," was in the words, "The owner or owners, master or captain, or other persons *employed in navigating* canal boats without masts or steam power, now by law required to be registered, licensed, or enrolled and licensed, shall not be required to pay any marine hospital tax or money; nor shall the persons *employed to navigate* such boats receive any benefit or advantage from the marine hospital fund; nor shall such owner or owners, master or captain, or other persons, be required to pay fees or make any compensation for such register, license, or enrolment and license; nor shall any such boat be subject to be libelled in any court of the United States for the wages of any person or persons, who may be employed on board thereof, or in *navigating* the same." And all acts, etc., repugnant to this act were thereby repealed.

"An act to regulate the admeasurement of tonnage of ships and vessels of the United States" was passed on 6th May, 1864 (13 Ll. U. S. 69). In § 3 of this act, the phrase *open vessel* is used to designate a vessel without a deck. The section prescribes the manner of ascertaining by admeasurement the register tonnage of vessels with a deck or decks, and also provides for ascertaining the tonnage of open vessels by admeasurement. Section 4 limits the charge for the measurement and certifying of tonnage, so that it shall not exceed $1.50

for each transverse section under the tonnage deck, and $3 for measuring each between decks above the tonnage deck, and $1.50 for each poop, or closed-in space, available for cargo or stores, or for the berthing or accommodation of passengers, or officers and crew, above the upper or spar deck. The act contains no express provision for any charge or compensation whatever as to open vessels. Section 5 is in the words: "The provisions of this act shall not be deemed to apply to any vessel not required by law to be registered, or enrolled or licensed, and all acts or parts of acts inconsistent with the provisions of this act, are hereby repealed."

The concluding clause of the act of 3d March, 1851, limiting the liability of ship owners (9 Ll. U. S. 635, 636), provides, that the act shall not apply to the owner of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation.

The Revenue Act of July, 1862, S. 15 (12 Ll. U. S. 558), imposed an additional tonnage duty on all ships, vessels, or steamers, entered at any custom house in the United States, from any foreign port or place, or from any port or place in the United States, or belonging wholly, or in part, to subjects of foreign powers, provided, that the tax or duty should not be collected more than once in each year on any ship, vessel, or steamer, having a license to trade between different districts of the United States. The Internal Revenue Act of 30th June, 1864, § 103 (13 Ll. U. S. 275), imposed a duty of 2½ per cent. upon the gross receipts of every railroad, canal, steamboat, ship, barge, canal boat, or other vessel, or any stage, coach, or other vehicle engaged or employed in transporting passengers, or property for hire. The Amendatory Act of 3d March, 1865, s. 4 (Ib. 493), increased the tonnage duty still further; and exempted the receipts of vessels paying tonnage duty from the tax of 2½ per cent. The 9th section of the Internal Revenue act of 13th of July, 1866 (14 Ll. U. S. 136), amended the 103d section of the act of 1864 by striking out all after the enacting clause, and substituting enactments imposing a tax of 2½ per cent. on the gross receipts from passengers and

mail carried by railroad, canal, steamboat, ship, barge, canal boat, or other vessel or stage, coach or other vehicle, with incidental regulations, and with certain exceptions and qualifications. It was further provided, that all *boats, barges, and flats, not used for carrying passengers, nor propelled by steam or sails, which are floated or towed by tug boats or horses, and used exclusively for carrying coal, oil, minerals, or agricultural products to market,* should be required hereafter, *in lieu of enrolment fees or tonnage tax,* to pay an annual special tax of five dollars, for each boat of a capacity exceeding twenty-five, and not exceeding one hundred tons, and ten dollars for each boat of greater capacity. This proviso is repealed by the act of 14th July, 1870 (see post). Section 33 of an amendatory act of 3d March, 1867 (14 Ll. U. S. 484, 485), was in the words: "The tonnage duty now imposed on all ships, vessels, or steamers, engaged in foreign or domestic commerce, shall be levied but once within one year; and, when paid by such ship, vessel, or steamer, no further tonnage tax shall be collected within one year from the date of such payment."

An act further to prevent smuggling, etc., passed 18th July, 1866 (14 Ll. U. S. 178), § 1, enacts that, *for the purposes of the act,* the term *vesssl,* whenever *therein used,* shall be held to include every description of water-craft, raft, vehicle, and contrivance, used, or capable of being used, as a means or *auxiliary* of transportation, on or by water; and the term *vehicle,* to include every description of carriage, wagon, engine, car, sleigh, sled, sledge, hurdle, cart, and other artificial contrivance used, or capable of being used, as a means or auxiliary of transportation on land. Section 28 enacted, that all vessels, which, under the provisions of the above mentioned 15th section of the act of 14th July, 1862, and 4th section of the amendatory act, of 3d March, 1865, were exempted from paying tonnage duties more than once in a year, should pay the same at their first clearance in each calendar year; provided, that all licensed, and enrolled and licensed vessels, should pay the duty when taking out their respective enrolments or licenses, if the same had not been previously paid; and provided

further, that nothing in the act should be construed to prevent customs officers from collecting such tonnage duty at the entry of any vessel during the year, if not previously paid; and provided further, that all vessels, which were subject to enrolment or license, should thereafter, be liable to the payment of the fees established by law for services of customs officers incident thereto.

The 25th section of the act of 14th July, 1870, to reduce internal taxes, etc. (16 Ll. U. S. 269), so amended section 15, of the act of 14th July, 1862, and section 4 of the amendatory act of 3d March, 1865, that no ship, vessel, steamer, barge, or flat, belonging to any citizen of the United States, trading from one port or point within the United States, to another port or point in the United States, or employed in the bank, whale, or other fisheries, should thereafter, be subject to the tonnage tax or duty *provided for in those acts;* "and the proviso in section 103" of the act of 30th June, 1864, "requiring an annual special tax to be paid by boats, barges, and flats," was repealed.

The intended subject of this repeal, was obviously the proviso contained in that part of the 9th section of the act of 13th July, 1866, which had been thereby substituted for the 103d section of the Act of 30th June, 1864.

The effect of the act of 1870, was to exclude wholly the application of previous and existing internal revenue laws to the boats in question.

The District Attorney, *Mr. A. H. Smith,* and the Assistant District Attorney, *Mr. Valentine,* contended, that the act of 1846, and the Tonnage Register Act of 1864, were in effect legislative declarations that the act of 1793 was applicable to such boats, that the enactment in the Revenue Law of 1866, imposing a special tax, in lieu of enrolment fees or tonnage tax, was a legislative declaration, that such boats had been liable to such fees and tonnage tax, and that the repeal of the latter act in 1870, revived this two-fold liability. They contended, therefore, that if there had otherwise been doubt of the

applicability of the act of 1793, the doubt was removed by the subsequent legislation.

Mr. Gibbons, for the claimant, denied the applicability of the act of 1793, to such boats. He relied upon reasons and arguments contained in the above opinions of counsel. He also contended that the act should not be understood as applicable to vessels of a kind unknown when it was passed; that the transportation of coal in these boats, was not a trading within the meaning of the act; that the act of 1846, left open to future decision the question of the effect of the former act, exempting the boats from fees and charges, whether otherwise liable to them or not; that the Tonnage Act of 1864 did not annul the exemption, or create any new liability of such boats.

CADWALADER, J.

The word "trading" may have meanings which vary with its different applications. In laws concerning navigation, every vessel carrying a cargo or passengers may in general be considered as trading. Boats of the kind in question, though, in the language of the repealed proviso of the Internal Revenue Act of 1866, "used exclusively for carrying coal, oil, minerals or agricultural products to market," would be considered as *trading*, within the meaning of the act of 1793, if it were otherwise applicable. (See 9 Wheaton, 215-219.)

I think that the act of 1793, if the 37th section had been omitted, would have been applicable to everything afloat, navigable by motive power of its own, and transporting a cargo, whether the motive power were that of oars, that of sails, or that of steam, whether the vessel were of a kind which was known at the date of the act or not, and whether she had a deck or was open. If a more limited meaning were attributed to the phrase *ship or vsssel*, purposes of the act might be frustrated. The 37th section shows, that an express exception was considered necessary, in order to prevent the act from being applicable to boats of more than five tons, moved only by oars. If the section had been omitted, there would be no more reason to exclude steamers from the application of the act of 1793,

than to exclude vessels propelled, in the primitive manner, by oars, of whose use the frequency has been diminished by the innovation of steam tugs. (See 9 Wheaton, 219, 220.)

Here, two alternative, and very different interpretations of the 37th section, must be considered. The section, according to one interpretation, excludes from the operation of every part of the act, all boats or lighters whatsoever, which are not masted; and, of boats and lighters which are masted and not decked, excludes only such as are employed in the harbor of any town or city. According to the other interpretation, the qualification of being *employed in the harbor of a town or city*, extends to all the subjects of the section; so that the exception from the operation of the act includes no boat or lighter not masted, unless it is employed in such a harbor.

According to the former interpretation, the boats in question, as they have no mast, could not be subjects of the act of 1793, for any purpose. According to the latter interpretation, the question of the applicability of the act cannot thus be summarily disposed of.

In deciding between the two interpretations of the 37th section, it must be remembered, that punctuation of a statute forms no part of it, and is not recognizable as controlling its interpretation (4 D. and E. 65, 66, Law Rep. 3 Com. Pls. 519, 521, 522; 9 Gray, 385; and see 11 Peters, 54). But it is necessary to find, if possible, a meaning and purpose for every word of the section.

If the first of the interpretations be adopted, every word will have its fair and full effect. "Nothing in the act" will then "be construed to extend to any boat or lighter not being masted—or, if masted, and not decked, employed in the harbor of any town or city." But, according to the second interpretation, the word *and* has no effect, which is not repugnant or embarrassing.

Therefore, if the question were new, I would have no difficulty in deciding that the 37th section of the act of 1793, excluded the boats in question from the application of the act of 1793, if it would otherwise have been applicable to them.

But the second interpretation of the section appears to have been so generally adopted, though I do not see for what sufficient reason, that I am constrained to doubt the correctness of my opinion upon the point. Therefore, as I am also of opinion that, although the second interpretation were the correct one, the conclusion would nevertheless be the same, I will, in what follows, consider the question of the applicability of the act of 1793 to these boats upon the assumption, which seems to have been so general, that the 37th section does not apply to them, but applies to such boats only as are employed in the harbor of a town or city.

I think the act inapplicable to the boats in question, because they are without oars, or masts, or steam, or motive power of any kind which can be called their own. For this reason, they are not included in the ordinary general description, of *ships or vessels*, which is *the only designation* contained in the act.

A vessel of private ownership represents an organization which is part of the social system of the country to which she belongs. In this representative character, she has legal attributes, and legal rights, and may incur legal responsibilities, however and by whomsoever she may be navigated (7 Wallace, 53, and see 21 Howard, 191, 192). The sole purpose of this organization is her navigation, and its incidents. That which cannot be made navigable through any internal command of a propelling force, cannot, in a strict sense, be, nautically speaking, a vessel, though she may be called such for the convenience of identifying her with what was once navigable, and may, in some cases, become so again. This remark applies variously under different circumstances. It may apply to a vessel when she is laid up in a port, at home or abroad, or when she is an absolute wreck, whether stranded or afloat; and may have a qualified applicability to a vessel's own boat when it is towed astern. The case of a sailing vessel which is lashed to the side of a steam-tug, is also temporarily an example. The Supreme Court have said, that "whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport

another vessel which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessarily, or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage, through the fault of those in charge of the vessels, must, under such circumstances, look to the tug, her master or owners, for any injuries that vessels or cargo may receive by such means" (24 How. 122). When the towage is by a hawser, the vessel towed is not liable except so far only as her movements are at her own command, and she is in fault, or negligent in respect of them (21 How. 193, 194).

The reason is much stronger, and its application more simple, in the case of the boats in question. They are absolutely, at all times, without motive power at their command. Though ordinarily called *boats,* they have been also more properly designated as floating trunks or boxes. They are not subject to admiralty and maritime jurisdiction. Judge Nelson was inclined to this opinion. He thought that they were not ships or vessels, when upon public navigable waters, because they had no power as respects navigation upon such waters (4 Bl. C. C. 205, A. D. 1858). The intimation was extra-judicial, the decision upon the merits being against the libellant. There had, however, been a previous decision of Judge Grier against the admiralty jurisdiction. He said that such boats were not ships or vessels in the maritime sense of the term; and added, that they *do not take out a coasting license.* (3 Wall., Jr., 53, 55, A. D. 1855.) This dictum is in point upon the present question. But it will be necessary to consider the question upon original grounds, because the case before Judge Grier was that of one of the canal boats on the Monongahela, which are described in the report somewhat differently from the description of the boats in question here; and also because laws concerning navigation may apply incidentally to what are not subjects of admiralty and maritime jurisdiction.

Certainly, however, such a boat as is here in question is not a *vessel* in any sense in which the word is ordinarily used in laws

concerning navigation. In the act of 1851, limiting the liability of ship owners, the general phrase, ship or vessel, must be understood as applicable only to a vessel responsibly navigated. Therefore, if the concluding provision, that the act shall not apply to the owner of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation, had been omitted, the former general phrase, if applicable to canal boats, would not have included any others than such as have sails, oars, or steam power of their own. To make the word vessel, or boat, in an act of legislation of any kind, applicable to the boats in question, superadded words of special description have been considered necessary. Thus, in the repealed proviso of the internal revenue act of 1866, they were described as *boats not propelled by steam or sail, which are floated or towed by tug-boats or horses.* In the first section of the act of the same year against smuggling, it was thought necessary to provide expressly that *for the purposes of that act* the term *vessel* should be held to include every description of watercraft, raft, vehicle, and contrivance used, or capable of being used, as a means or *auxiliary* of transportation, on or by water. This amplified form of description would not have been adopted, if the word *vessel,* unexplained, had been deemed of co-extensive import. If the description, thus amplified, includes the boats in question for the purposes of that act, they are so included by force of the phrase *means or auxiliary of transportation on or by water.*

Vessels to which the act of 1793 applies, and which, on compliance with its requirements, are entitled to the privileges and exemptions conferred by it, must be owned and commanded by citizens of the United States. Before any boats like those in question were known, an act of Congress of 12th March, 1812 (2 Ll. U. S. 694), allowed steamboats employed only in rivers or bays of the United States, owned wholly or in part, by resident aliens, to be enrolled and licensed as if they belonged to citizens of the United States, according to, and subject to, all the conditions, limitations and provisions contained in the act of 1793. The tugs which tow the boats in question may thus

be owned by resident foreigners. The enactment of 1812 was not mentioned in the argument of this case. But my attention was drawn to the act by an observation of counsel, that a great many of the boats in question are owned, or in the charge of resident aliens. If such a fact has been wholly disregarded for the greater part of half a century, the most rational explanation is, that the exemption of the steam tug, which alone has the motive power, has been regarded as including that of the tow which has no independent navigability. The suggestion that the character and amount of the fees and charges for transporting coal, or anything else, from the interior of the country to a domestic market by towage, may vary as the Irishman, German, or Englishman owning the tow or having charge of it, has, or has not, become a naturalized citizen, seems absurd.

If the foregoing views are correct. the words of the act of 1793 do not apply to canal boats having no motive power of their own, but, according to the second interpretation of the 37th section, apply to canal boats of a certain tonnage, which, though without masts or steam power, have oars. That the latter boats, when in rivers and bays, have the command of their own movements, with consequent responsibilities, might be a sufficient reason that they should be requirable to be licensed, or enrolled and licensed. But that they should incur the incidental burdens of coastwise *maritime* navigation was nevertheless very incongruous to the nature of inland navigation. This may explain the purpose, or one of the purposes, of the act of 20th July, 1846. It may have been a reconciling purpose to remove this incongruity, and yet fulfill the exigency of the act of 1793, by relieving canal boats with oars of all maritime burdens without dispensing with the requirement of a license or enrollment and license. Another purpose of the act of 1846 may have been to meet provisionally, in like manner, any future decision of the case of canal boats like those now in question, which had then been a disputed case. If this twofold purpose existed it would have been attained by defining in the act, the subjects of it as "canal boats without masts or steam power," and exempting them from the *peculiarly maritime* burdens of hos-

pital dues, fees and charges of registering, enrolling or licensing, and subjection to libels for wages. The boats thus exempted, whether provided with oars or not, were, according to this interpretation, such boats only as were then, "by law, required to be registered, licensed, or enrolled and licensed."

The opinions of counsel which have been mentioned in the course of the argument, and the accompanying letters from the officers of canal companies, were filed in 1845, in the Treasury Department, where they now remain. There can be little doubt, if any, that these papers were before the eyes of the framer of the act of 1846. It is, therefore, extremely probable that he had in view the twofold purpose which has been suggested. But, unless the words of the act sustain the consequently suggested interpretation, it cannot be adopted. The intention of a lawmaker is to be legally deduced, not from what may thus have been his probable purpose, but from the meaning of the words which he has used. Here I doubt greatly whether the meaning of the words authorize the suggested interpretation of the act of 1846.

In the contexts of this act, wherever the phrase *canal boats without masts or steam power* occurs, it is never used otherwise than in connection with *persons employed to navigate them.* It is true that the former expression is once used with a disjunctive relation to the owners. But it is also twice used without any possibility of such an alternative relation. The words "nor shall the persons *employed to navigate* such boats receive any benefit or advantage from the *marine hospital fund,*" and the provision against libelling any such boat for the wages of any person or persons employed on board or in *navigating* her are thus applicable to such canal boats only as have oars. Therefore, I incline to the opinion that the application of the words of the act is limited to such as have oars. The provision against libelling for wages would otherwise be insensible, as well as the provisions concerning persons navigating the boats. The only doubt is, whether the act applied likewise to the boats in question. This doubt is, to say the least, very great.

The point is quite immaterial, if I am right in thinking, as I do, that there is no intention apparent in the act of 1846 to determine to what boats the act of 1793 applied. It was, however, in the argument, assumed that the act of 1846 indicates a belief on the part of Congress that all canal boats without masts or steam power, including the boats in question, were, by law, required to be registered or licensed, or enrolled and licensed; in other words, a belief that the act of 1793 applied to all such boats. Though I think the assumption erroneous, it will not be amiss to consider whether, if the words of the act of 1846 imported such a legislative belief, they would affect the decision.

If such were the meaning of the words they would, as we have seen, misconstrue the act of 1793. Words of legislation importing an erroneous construction of a pre-existing statute have not the effect of a law establishing the construction as valid for the future, unless they also import a declaratory or other enactment. This rule, however well established, is very seldom applied, because there is no invariable form of a declaratory statute, and the legislature may at pleasure enact how a prior one shall be construed in future. We have also constant experience that successive statutes on the same subject may be read in connection with one another and harmonized, as if they together constituted one and the same law. These explanations and qualifications of the rule do not abrogate it. My predecessor, Judge Hopkinson, stated the rule too broadly, perhaps, when he denied that a legislature had a right to impose upon a court their construction of their statutes previously passed. He said that it was for the court to construe the law; but added that it was the right and duty of a judge to look into all the statutes made upon the same subject, to discover what was the intention of any of their provisions, thus to ascertain the true meaning and construction by his own judgment, and not by any subsequent legislative declaration of intention or construction. (8 Peters, Appx. 734.) The rule, and a proper qualification of it, were stated with precision by Chief Justice Marshall. He said that a mistaken opinion

of the legislature concerning the law does not make the law, but that if the mistake is manifested in words competent to make the law in future, there is no principle which can deny them this effect, and that a law, not in form declaratory, though inoperative on the past, may act in future by expressing the sense of the legislature on the existing law as plainly as a declaratory act. (12 Wheaton, 148, 149.) In an English case, Le Blanc, J., said that a court, if clear in their construction of a statute, would be bound to give it effect, though they should be of opinion that an erroneous construction had been put upon it by subsequent statutes. (16 East, 326.) In that case, the framers of a statute had, in reciting a prior statute, misconstrued it. Lord Ellenborough said that he might be under a compulsion, through subsequent statutes, to put a perverse and unnatural interpretation on the original statute, but that he would endeavor, as far as he could, without violating the fair rules of construction, to maintain the integrity of the original text, unvitiated by subsequent misconstruction, if he might so say. (Ib. 319, 320.) After stating and explaining the misconstruction, which consisted in misreciting the effect of the original statute, he asked whether the framers of the misconstruing statute had imposed upon the court, *by any enactment*, the necessity of adopting that which he must assume to be their error if the words of the prior act were intelligible in themselves. In his opinion the recital in the subsequent act could not overrule the plain, intelligible sense of the prior one. (Ib. 324, 325.) Where a perpetual statute, English or colonial, was, through legislative inadvertence, continued in force by the words of a subsequent statute until the end of the legislative session, or for two years, the perpetual statute was not abrogated, but continued in force after either period limited. (Hobart, 215; T. Ray, 397.) An act of the legislature of Pennsylvnia subjected all real estate within one of the corporate municipalities of a county to a lien for assessments, to which all real estate in the county had, by a former act, been made subject. The Supreme Court of the State said that the passing of the subsequent act, at most, only proved that the

legislature were not then aware that the assessments had been made liens by the previous act; and added that it could not be sustained for a moment, that the legislature's mistake or misapprehension of the law in this respect would make it different from what it really was. (5 Rawle, 317.) A series of English statutes prohibiting and restricting commerce, etc., with enemies were forensically reviewed in 1794. (6 D. & E. 38-44, 47-50.) Many of these enactments indicated that the parliament conceived the prohibitions necessary in order to make such trading and intercourse illegal. Most of the legislative provisions on the subject were otherwise unnecessary. But they were wholly disregarded in this resepect by decisions of the King's Bench (6 D. & E. 23, 35; 8 D. & E. 548, 561), and had previously been so disregarded by the Court of Admiralty (1 Rob. 196, 220).

If the law of 1846 had contained words of equivalent effect with a recital that the boats in question were included in the law of 1793, the only enactment in the law of 1846 would be the concession of an exemption from certain supposed liabilities. Such a legislative concession would not constitute an enactment including the boats in that description, or otherwise enlarging the effect of the act of 1793. The authorities which have been cited, therefore, show that the decision of this case cannot be affected by the act of 1846.

It is not necessary to consider the Tonnage Measurement Act of 1846, because the 5th section excludes the application of the act to any vessel not required by law to be registered, or enrolled, or licensed.

As to every question in this case, the act of 1870 has excluded wholly the application of the internal revenue laws of 1862, 1864, 1865 and 1866. If they had continued in force, the only question which would have required attention, has, in principle, been disposed of in considering the act of 1846. This question would have arisen upon the words "in lieu of enrolment fees or tonnage tax," in the proviso contained in that part of the 9th section of the Revenue Act of 1866, which was thereby substituted for the 103d section of the Revenue Act of

1864. If these words indicated a legislative belief that the boats in question were subject to the payment of enrolment fees or tonnage tax, they were words, not of enactment, but recital, and misrecited the existing law. But the repeal of the proviso deprives the question of any importance, which might otherwise have been attributable to it.

The only act of Congress which has not been sufficiently considered is a provision of the 28th section of the act of 1866, against smuggling. The provision is, that all vessels, which were subject to enrolment or license, should thereafter be liable to the payment of the fees for services of customs officers, incident thereto. This provision, considered as an isolated enactment, would be of no significance in the case. If, as to those canal boats which are included in the description of *vessels* in the act of 1793, the provision repealed the exemption from certain maritime charges, of which such canal boats had been relieved by the act of 1846, the process of legislation to deprive them of the exemption was indirect, and the exposition of the purpose to do so was obscure. But, if such was the legislative intention, it could not extend beyond the subjects of the former exemption; and, if I have rightly interpreted the act of 1846, which conceded the exemption, the act applied only to such canal boats, without masts or steam power, as have oars.

The point of inquiry is, however, different. The question is upon the effect of the 1st section of the act against smuggling on this provision of the 28th section. The 1st section, which has already been quoted, extends, for the purposes of the act, the meaning of the word *vessel* so as to make it, for such purposes, include every description of watercraft and means or auxiliary of transportation on or by water. The title of the act is, "An act further to prevent smuggling and for *other purposes*." The provision of the 28th section applies to all vessels subject to enrolment or license, and the argument for the United States, if I rightly understand it, is, that the provision must be read as if its words were: All vessels, including every description of watercraft and contrivance used or capable of being

used as a means or auxiliary of transportation on or by water, which are subject to enrolment or license, shall hereafter be liable to the payment of the fees established by law for services of customs officers incident thereto.

If this were the actual phraseology of the 28th section, it would have no effect beyond subjecting to payment of the fees all such watercraft, etc., as were already subject to enrolment or license. Whether it would be wise or unwise to abrogate thus far the exemption conceded in 1846, the purpose to do so would be intelligible. But the phrase, *purposes of this act*, in the act of 1866, would be extravagantly extended beyond its fair import, if made to enlarge inferentially the purposes of other statutes whose provisions may be supposed incidentally in question.

To effectuate the legitimate purposes of the act against smuggling, boats, trunks, or boxes, like those in question, may, in certain cases, be forfeitable, as appendages of the tug which tows them, for her violations of penal enactments. Whether, in other cases, they may, when themselves peccant receptacles of smuggled property, or when otherwise used unlawfully, be forfeitable independently of such tug, is an inquiry foreign to the question whether they are, when towed by her, subject to distinct enrolment or licensing under the act of 1793. The purpose of the 1st section of the act of 1866 was merely to prevent its own provisions, in subsequent sections, from being liable to evasion through any mis-description or doubtful description of watercraft. It was no purpose of the act to duplicate requirements of the act of 1793 by requiring enrolment or license of the tows which are without motive power, and of whose tug a license was already required.

As these tows, though innavigable, float when detached from their tug, legislation requiring them to be named, and enrolled, or licensed, might be useful to prevent smuggling, or facilitate its detection. But the inference of such a motive of legislation, from words of enactment imposing charges which are properly incidental to such navigation only, as, whether coastwise or foreign, is peculiarly *maritime*, would seem irrational.

Libel dismissed.

DISTRICT COURT. AUGUST 30, 1872.

ADMIRALTY.

THE WREATH.

1. Ordinarily, counsel fees are not allowable in this district as a charge against a vessel or cargo. When allowed it is for extraordinary reasons—as when they are for services which a mere selfish consideration of the client's interest would not have induced the advocate to render.

2. A claim for supplies and advances previous to the date of a bottomry bond will not be considered when the proceeds of vessel and amount of freight do not reach to any part of it.

LIBEL on bottomry bond.
SALE of vessel.

J. Hill Martin, for libellant.
Samuel S. Hollingsworth, for the vessel.

MINUTES of decree.

CADWALADER, J.

The questions which are the subject of disagreement having been argued by counsel, the Court unhesitatingly allows the costs, amounting to $334.01.

As to the so-called charges of counsel, they are not in this judicial district allowable in ordinary cases. In cases in which a common interest has been promoted by services which a mere selfish consideration of the client's interests would not have induced an advocate or proctor to render, the charge of a part or even the whole of the compensation of counsel may, however, sometimes be proper. (9 Wheaton, 379.) The allowance when made, is on exceptional and extraordinary reasons. In this case the reasons exist and are sufficient. The only doubt is, whether the whole or a part only of the amount in question should be allowed. As it is extremely moderate, and an apportionment would be difficult, I allow the whole.

The proceeds of the vessel (a schooner) and amount of the freight not being sufficient to reach any part of the demand of

S. C. Loud & Co., whose libel of intervention was filed on the 6th of July last, the validity of this demand as against any present subject of litigation has not been considered.

Bills for towage, $4; surveyor of port, $28; hire of chronometer, $33; H. L. Gregg, $36.76, having been presented to the clerk, the freight appearing to have been sufficient for their discharge, they are disallowed as claims upon the fund in court, with leave, however, to the respective parties to move the Court at any time before final distribution.

The clerk is directed to advertise in two daily papers of general commercial circulation in Philadelphia, and one such paper in New York, that any person having claims upon the proceeds of sale of the vessel must present the same within ten days from the first publication or they will be debarred, etc., such publication to be made twice a week in each paper.

DISTRICT COURT. NOVEMBER 12, 1872.

INTERNAL REVENUE.

THE UNITED STATES *v.* WHISKY: BRESLIN, CLAIMANT.

1. On the trial of an information for violation of the internal revenue laws, the jury may infer from an isolated transaction that the general character of the defendant's business was fraudulent.

2. But an instruction to the jury to that effect should be qualified by an exemption of the defendant from a general forfeiture if the particular act was committed without his privity or connivance.

INFORMATION under acts of Congress of June 30th, 1864, and July 20th, 1868, for removal of raw materials, etc., with intent fraudulently to manufacture and sell the same to evade payment of taxes, etc.

The first verdict was for the United States.

On the motion for a new trial the following opinion was filed.

The second verdict was for the United States.

CADWALADER, J.

A recent English decision cited by the District Attorney of the United States, which is conformable to older precedents, removes all doubt as to the propriety of what occurred after the charge to the jury.

I also think that the verdict was right. The only doubt which I have is whether the question of fact was sufficiently left by the court to the jury. This question was whether an isolated transaction occurring in the course of the claimant's business was sufficient evidence to induce a belief that the general character of the business was fraudulent. On this point the instruction given may have induced the jury to believe that no verdict for the claimant would have been satisfactory to the Court. If the instruction had been distinctly qualified by an exemption of the claimant from a general forfeiture if the particular act in question was committed without his actual privity or connivance, the verdict should not be set aside. The proceeding to enforce the forfeiture, though highly penal, is a civil proceeding. The claimant was consequently liable in it for acts or omissions of his agents or of those whom he allowed to transact his business. The particular goods, therefore, as to which the fraud was proved were forfeitable at all events; and, as to the other goods, the burden of proof to show that he did not connive, or participate, was reasonably cast upon him. What proof might suffice to exonerate him cannot be precisely defined, because even if he was ignorant of the particular fraud, his business may have been so conducted as to enable those in his employment to carry it on fraudulently. But if the general business was really fair and innocent, and an isolated fraud as to particular goods was committed by others, without his direct or indirect participation, the verdict might have been different as to the residue.

On the whole, therefore, and more especially as the subject could not be reviewed upon a bill of exceptions, I prefer letting the case be submitted to another jury.

New trial ordered.

CIRCUIT COURT. DECEMBER 20, 1872.

EQUITY.

WELLS *v.* HAGAMAN.

1. In the machine for making hat bodies, the fibres of disintegrated fur which compose the bat, are deposited upon the surface of a revolving perforated cone, beneath which a fan partially exhausts the air. This exhaustion causes an atmospheric pressure which, above and around the cone, forces the fibres towards it, and retains them upon it. The fur is previously disintegrated by a revolving picker. A defect of the machine was that the currents of air produced by the rotation of the picker, not being *conducted*, or *directed*, in proper planes, towards the cone, were divergent, and scattered the fibres. This former defect was first remedied by interposing an air-chamber, to conduct the stream of fibres from the front of the picker, in the proper planes, towards the cone—with auxiliary and incidental appliances.

2. A patent for such an air-chamber and appendages was not infringed by the substitution of a short uncovered fur-projector in front of the picker. The revolution of the picker, if downward, produced a current of air whose primary direction was forward and downward. This direction of the air downward was gradually changed on the surface of the *fur-projector;* which was formed, or composed, of a plate, or system of adjacent plates, of such a graduated inclination upward, and such a compound curvature, as coincided with a theory that the aerial current should project the fibres beyond the plate, or plates, through open air, for the distances, and in the planes required.

3. What would otherwise have been such a fur-projector may be so elongated towards the cone, and may be of such curvature and elevation, as to become in effect, a conducting trough, upon whose bottom the pressure of the air, from the resistance of its continuing downward tendency, may be so retained, that a cover and elevated sides can be dispensed with. The patent was infringed by the use of such a trough, which the fibres did not leave until they arrived where the dominant aerial force towards the cone was no longer than that which had originated in the rotation of the picker, but became that of atmospheric pressure caused by the exhaustion below the cone.

4. In a case, doubtful in this respect, the question, which force predominated where the fibres left the supporting surface, might be a proper subject of reference to a commission of experts, or to a master.

5. The bat, when formed upon the metallic perforated cone, is covered with a felted or fulled cloth, wet with hot water, over which is drawn another perforated metallic cone, with or without an additional inner one, when the whole are immersed in hot water, whereby the bat is hardened sufficiently to be removed from the cone. The novelty of such a use of

the wet hot covering cloth was denied where a printed description of a like use of a *cowl* of linen or flannel to be drawn gently over the bat, had been previously published. It was objected to the prior description, that a *cowl,* properly so called, could not be thus used without a destructive abrasion of the newly formed bat. To this objection, it was a sufficient answer, that if such abrasion would have occurred from such use of a cover sewed up in the form of a cowl, a person skilled in the art would have understood the intended or proper use to that of an open cloth, gently folded in the form of a cowl, upon the bat.

6. It was further objected that the prior description—though it stated that the original perforated cone, the bat, and its flannel or linen cowl, were to be covered wth the other perforated metallic cone, and the whole then at once immersed in the boiling water—omitted to state that the linen or flannel cowl, when first applied, was to be wet with hot water, or wet at all. To this objection it was answered first, that, until the immersion of the whole, either a dry cloth or a wet one could be used, and that the difference was unimportant; secondly, that if it was important, then, as the hot water was always at hand, and its uses were already well known to the hat maker, the wetting of the covering cloth with it, was either implied, or must have obviously suggested itself to a reader of the prior description who was skilled in the art. The second answer was a sufficient one, whether the first was or not.

BILL for infringement of a patent for an invention.

This case was heard upon the complainant's application that process of contempt should be awarded against the defendant for breach of a special injunction, and for breach of the further injunction included in a short decree against him that the complainant's bill be taken as confessed.

It was agreed that the question of infringement should be open to contestation, as if no decree *pro confesso* had been entered.

STATEMENT OF THE CASE.

In the following statement, the pages noted are those of the report of the case of Burr *v.* Duryee, in the Supreme Court (1 Wallace, 531-581), and the references by letters are to the several drawings or figures in that report.

In the machine for making hat bodies, the fur is disintegrated by a horizontal picker, whose revolutions are, it is said, two thousand, more or less, in a minute. The fibres of dis-

integrated fur which compose the bat are deposited upon the surface of a revolving perforated cone (page 558, fig. 12), beneath which a fan partially exhausts the air. This partial vacuum causes an atmospheric pressure, above and around the cone, forcing the fibers towards it, and retaining them upon it. There was no authenticated measurement of the ordinary intensity of this atmospheric pressure; nor was there any evidence of the ordinary number of revolutions of the fan in any given time.

The original patent of Wells (A. D. 1846), whose administratrix is the complainant, states that it has long been essayed to make hat bodies, by throwing the fibres of fur, wool, etc., by a brush or picker cylinder, into a perforated cone, exhausted by a fan below, to carry and hold the fibres thereon by the currents of air that rush from all directions towards and through the apertures of the cone, and thus form a bat of fibres ready for hardening and felting. He added that all these attempts had failed.

The experiments, to which he referred as having failed, had been made where no mechanism was interposed between the rotating picker and the revolving perforated cone. Such of the fibres as reached that part of this intermediate open space which was near the cone, were deposited on it through the suction caused by the atmospheric pressure.

The defect of the machine was the absence of a proper instrumentality to prevent previous divergence of other fibres in those parts of the open space which were nearer to the picker.

To economize what was thus wasted, and regulate the distribution of the fibres upon the cone in the different quantities required for varying the thicknesses of different parts of the bat, Wells (see the drawing on page 543) enclosed the picker (F) in an air chamber (M), extended so that its outlet *(q. s.)* was near to the cone (O). This chamber he called a tunnel. His original patent describes a brush or picker F, whose back revolves downward, as the upper arrow indicates, and whose front, of course, revolves upward. This picker F is fed by a regulated supply of fur from behind (b, b′, c, d). The

fibres, as liberated from the picker, pass down a curved surface below the same upper arrow, towards the bottom of the tunnel M. In consequence of the encasing of the picker F, the supply of air would fail if the deficiency were not provided for. The supply is received from behind, through a narrow aperture N. at the bottom of the tunnel. (See the lower arrow.) Here an inward current of air, produced by the rotation of the picker, is thrown by this rotation forward and upward into the tunnel, and expands within it. The air slit N, though not an independent invention, was an important incidental part of the tunnel. From this entrance, the current of air, "induced," as the original patent states, "by the rotation of the brush F, and the partial vacuum in the perforated cone O, *prevents the fibres of fur from falling and resting on the bottom of the chamber M, and carries them on to the perforated cone.*" The "*chamber or tunnel*" is described as *gradually changed in form towards the outlet*, where it assumes a shape nearly corresponding to a vertical section passing through the axis of the cone O, but narrower" than the cone, "for the purpose of *concentrating and directing the fur* thrown by the brush into the cone." The original patent also states that *the top R* of the chamber "is *gradually elevated, and the sides contracted to make the delivery aperture,*" i. e., the outlet of the tunnel, "*nearly of the form of the cone, but narrower and* HIGHER," etc. At the bottom of the outlet was a hinged flap (q), to regulate the delivery of the fibres; and the upper part was provided with a hinged hood (s) which, whether operated by hand or by machinery, was carried up and down, to direct the discharge of the fibres, and distribute them properly on the cone O, with the varying thicknesses required for different parts of the bat.

The patent having been several times surrendered and reissued, and having been extended by the commissioner of patents, and afterwards further extended by Congress (14 Ll. U. S. 637, 638), was again reissued in 1868. In this last reissue, the tunnel's bottom, sides, and top are described separately, as if they were disjoined plates; and the office attributed to each of them is explained separately; after which the de-

scription states that they "are all *united along their edges,*" in the machine illustrated by the accompanying drawings. The original model, however, in which they compose a single entire tunnel, as described in the original patent, remains in the patent office to show the meaning of the new phrase "united along their edges."

Of this tunnel as originally patented, the novelty and great utility have never been disputed. Under this head, if the case depended upon the original patent alone, the only question would have been that of infringement.

In the machine whose use by the defendant was complained of as contumacious, the revolution of the face of the picker nearest the cone was downward. He used, as a substitute for the tunnel, an uncovered plate or board in front of the picker. On each side of this board was a raised edge inclining inward. The board, as the defendant contended, was of such a curvature and inclination as coincided in theory with an appliance called a *fur-director,* described in a patent granted in 1860 to Boyden. The Supreme Court had, it was contended, decided in Burr *v.* Duryee, 1 Wallace, 531, that the use of such an appliance was not an infringment of the patent to Wells.

The machine in which Boyden's fur-director was used is represented on page 549; and there is a drawing of the fur-director separately on a larger scale, at foot of page 560 (fig. 21).* The revolution of the front of the picker D was downward, and in front of it was the fur-director F. The rotation of the picker was thus in the direction opposite to that of the picker of Wells; and the primary direction of the current of air produced by the rotation of Boyden's picker was consequently forward and downward, instead of forward and upward. But the downward current of air was received directly in front of Boyden's picker D, upon the surface of his fur-director F, which was an uncov-

* On page 550, line 8, the omission of a number after the word *figure* might mislead the reader into a belief, that the intended reference was to the figure on page 549, whereas, it appears, on reading Boyden's patent, that the intended reference on page 550, l. 8, was to the figure which is mentioned as No. 21, in another connection at the foot of page 560.

ered curved plate, so inclined upward, as gradually to change in part, the direction of the aerial current. The plate was described in the patent of Boyden, as so bent or curved, that its surface would have a certain relative position with the axis of the picker D, and the surface of the cone B, and give such a direction to the fur, as the latter was thrown on it by the rapid motion of the picker, that the fur would be drawn properly on the cone by the exhaust or suction within it. The plate F was described as of a compound curvature, longitudinal and transverse. Its highest point was at the centre; and the longitudinal curvature was gradually downward and upward on each side of the centre, with a slightly concave form. The transverse curvature corresponding with the surface of the cone B, was described as follows: "The highest and central part of the plate F has its surface in line, or in a plane, which bisects longitudinally the axis of the picker D, and strikes the apex of the cone B; and the surface of the plate F, at each side of its centre and highest point, is formed of portions of planes which bisect longitudinally the axis of the picker and points on the cone, extending down to its base." The following additional passages may be quoted from Boyden's patent: "The picker D, by its rapid rotation conveys the fur around on the plate F, which in consequence of its being curved, as described, causes the fur to be *projected* towards the cone B in a series of planes extending from its apex to the base, the exhaust or suction within the cone drawing the fur on it, after the proper direction has been given to the fur by the plate F, the velocity of the picker being sufficiently great to *project* the fur within the influence of the exhaust of the cone. . . . This peculiar curvature of the plate F not only gives the proper direction to the fur, so that the latter may cover the cone; but it also directs the fur to the cone in proper quantity; for instance, the central and highest part of plate F is comparatively a short curve, and directs a small quantity of fur to the upper part of the cone, where but a small portion is required, but it will be seen that the lower part of plate F has a double curved surface to supply the cone, one at each side of its centre, so that the cone will be

properly supplied, the supply gradually increasing from the top to the bottom of the cone. . . . The plate F, is gradually elevated at its outer edges, or towards the cone, from the positions above stated, in order to compensate for *gravity;* the latter serving to counteract in a measure, the power of the exhaust, and that of the picker, and give a downward movement to the fur. By slightly elevating the direction of the fur above its otherwise proper path, due provision is made for such a contingency."

What Boyden claimed as his invention was "the FUR-DIRECTOR or plate F curved or bent substantially as shown, and arranged in relation with the cone B and picker D, to operate substantially as and for the purpose set forth."

The fibres are so volatile that their escape from the machine of Boyden, as hitherto described, would cause great waste. It is diminished by his appliance of a concave piece G, so connected with the inner lower end of the plate or fur-director F, as to form a semi-circular close cavity under the picker D, and in the words of his patent, permit any fur that might escape down between the plate F, and picker D, to be brought up by the picker, so as to be again projected on the plate.

The material is thus economized. This concerns the useful effect of the whole machine, but not the mechanical effect of the fur-director, considered as alone the part here in question. Whether Boyden's machine, with the aid of this lower chamber, economizes the material sufficiently for practical competition with Wells's machine, was treated in the argument as unimportant, unless where explanatory of supposed motives of alleged infringement.

If the board used by the defendant was proportioned as the fur-director (F) in Boyden's drawing (page 549), the length from its inner to its outer end (towards the cone) would not exceed about four inches. The actual extension of the defendant's board in this direction is about eight inches, this being rather more than a fourth of the whole distance of the circumference of the picker from the middle of the nearest surface of the revolving cone.

When the bill in this case was filed, the defendant used, where this board or plate now is, a system of adjacent curved metallic flexible plates of which the extension towards the cone was not less prolonged. In a case of Jacques *v.* Weeks, tried at law in the Circuit Court for the Southern District of New York before Judge Woodruff, in January, 1871, such a use of like plates was found by the verdict of a jury to infringe the complainant's patent; and that court afterwards entered judgment upon the verdict. The present defendant, not conceiving himself at liberty to disregard this decision at New York, ceased to use the plates. Afterwards, assuming that the decision was not reconcilable with the prior decision of the Supreme Court, unless he was at liberty to use a fur-director of some kind, and not conceiving shortness of such an appliance to be essential to its proper definition, he substituted the present board. Upon this, the first question of contumacy arose.

In the original patent of Wells, and in the complainant's reissue, the claims of invention are differently expressed. In each, they are multiplied as for inventions of combinations variously described. But novelty can be properly alleged of two subjects only. One of them, the tunnel, has been fully described.

The other is a covering cloth which, wet with hot water, is applied to the bat, when formed upon the cone. The complainant's patent, if it was valid under this head, had been infringed. The question was only upon the novelty of this latter claim of invention.

In the complainant's reissued patent, it is stated to be well known that the application of hot water to a bat of fur fibres which have been suitably prepared to be made into hats by the well-known felting process, is to partially felt the bat so that the fibres will hold together. This must be understood with reference to the state of the art at the date of the original patent. That patent also states that after the proper supply of fur has been deposited on the pervious cone, the non-united fibres are there held, in the form of a bat, only by the pressure of the surrounding air induced by the exhaustion of air from

the inside of the cone, and hence, if, in that condition, the operation of the exhausting mechanism should be suspended, the fibres would be no longer held by the surrounding air, and would, by force of gravity, fall and destroy the bat. To prevent this, and render the bat available in the manufacture of hats, a flexible cloth is used. "The attendant takes from a kettle of hot water a piece of felt, or other cloth, rolled upon a roller, and applies one end of it to the surface of the bat still held by the pressure of the surrounding air, and as the cone rotates, the felt cloth winds from the roller on to the bat; and, as the tip of the cone is semi-spherical, and this cloth cannot be conveniently extended over the tip, another piece of cloth, also taken from hot water, is applied to the tip of the bat." In this condition, the specification states, that "not only could the cone be safely removed from the machine, but the bat could be safely removed from the cone by careful handling." But in order "to harden the bat to a state of greater consistency after the wet cloths have been applied . . . a strong perforated metallic cone is put over the cloth, and the whole is then dipped in hot water; and after that, the bat can be removed from the cone and handled without the necessity of much care." The specification then describes an inner sustaining cone, and explains how it may be dispensed with.

The claim under this head in Wells's original patent of 1846, was "covering the bat with felted or fulled cloth before it is removed from the cone, or former, as described."

What is claimed in the present reissued patent of 1868, is, "in combination with the pervious cone provided with an exhausting mechanism substantially as described—the covering cloth, wet with hot water, substantially as and for the purpose described."

Upon the question whether this was, in 1846, a novel invention of Mr. Wells, the defendant put in evidence two prior patents.

Hurlbut's patent (A. D. 1831) was for the use of a vibrating exterior shell to harden hat bodies. His claim was for admitting steam into the cone upon which they were formed, and also

for covering this cone with the cap or shell. The cone upon which they were formed was perforated with holes; and *when the web which constituted the body was wound upon the cone it was "covered with a cloth;"* and over the whole was put the vibrating cap.

Ponsford's English patent (A. D. 1839) was published in print before any invention of Wells. Ponsford's improvements were, as he said, communicated by a non-resident foreigner. The improvement in the manufacture of hats, thus communicated, consisted, Ponsford said, in forming the felted bodies of hats, wholly with cattle hair, or of cattle hair mixed with other materials, after being prepared in a certain manner. He stated that hat bodies had been made of felts manufactured from wool and furs, both separately and mixed in various proportions, but that he was not aware that a felt made wholly or in any considerable proportion of cattle hair had ever been applied to the making of hat bodies. He then described as follows the manner in which cattle hair was recommended by his informant to be felted and formed into hat bodies, viz.: The hair being cleansed or prepared should be passed through a blowing machine such as was in common use, and then formed into a bat or fleece by means of mechanical arrangements founded on the principle of exhaustion, that was to say, the hair, as it passed from the blowing machine was to be tossed or thrown into the air from which it was to be sucked or drawn down upon hollow perforated cones or molds of metal or wood, with an exhausting cylinder beneath. He added, "When the hair has been received on one of these perforated cones or molds to a sufficient thickness, *a cowl of linen or flannel is to be drawn gently over it*, and then a hollow perforated cover of copper, or any other suitable metal is to be dropped over the cowl; the cone or mold is then to be immersed in a vat or tub of boiling hot water, and there allowed to remain for about a minute, after which it is to be taken out, and the metal cover, and flannel or linen cowl, removed, when the bat or layer of hair will be found felted to a degree that it may be readily finished off by the workman, in the usual manner, at the oven."

The Supreme Court, after a remark that the complaint of infringement under this head had not been much insisted on, said: "The respondents contend that it is void, being for the same invention patented to Ponsford in England in 1839, and known to Wells, who was at the time in England. This allegation we find to be fully supported by the evidence, and decide accordingly" (1 Wallace, 577-78). That Wells was in England, or what he knew, was not proved in the present case. But this was immaterial, as the patent of Ponsford had been published in print. The important observation was, that Ponsford's was the same invention. This observation of the Supreme Court lost, however, a great part of its force because the decision was upon Wells's patent as reissued in 1860, in which reissue the claim of invention under this head, whatever might have been its merits, was not so expressed that it could be supported.

The complainant opposed three objections to the sufficiency of the description contained in Ponsford's patent, (1) that the subject of this part of his patent was not fur but hair; (2) that what Ponsford suggested was useless, because a *cowl*, properly so called, could not be used without such abrasion of the newly-formed bat as would have ruined it; (3) that he did not suggest that the cloth or cowl should be wet with hot water, or wet at all.

The case was argued by *Mr. Dickerson* and *Mr. Myers* for the complainant, and by *Mr. Collier* for the defendant.

CADWALADER, J.

I am of opinion that the defendant is infringing the complainant's patent for the air-chamber. But in so deciding I have been embarrassed, because, in the argument for the complainant, the authority of a judicial *precedent* has not been fully attributed to the decision of the Supreme Court, reported in 1 Wallace, 531. The question of the authority of this decision has been confounded with some correct, but inapplicable, propositions upon the inconclusiveness of a *judgment*, except as

between the litigants. To have contended that the propositions discussed by counsel in that court are inapplicable to the present form of the question, and that the experimental operation of the *museum of machines* there exhibited (see page 578) may not have represented their ordinary working condition, would, however, have been a fair and proper course of argument.

I have also been embarrassed, because, since the inventor's death, the subject has been obscured rather than elucidated in reissues of the patent. Whether the reissue of 1868 could be sustained without reference to the original drawings and models, and to the original patent of 1846, remaining of record, is perhaps doubtful. But the reissued patent, aided by the model, etc., may, I think, be sustained. Therefore it will not be necessary to note any intermediate surrenders and resissues, except occasionally. The case will be considered upon the assumption that whatever Wells invented is well patented.

To relieve my own mind of such embarrassments, I have prefixed a statement of the case, which may be considered as an introductory part of this opinion.

In the machines which have been exhibited or described, the current of air produced in front of the picker, by its rotation, was upward or downward as the rotation was upward or downward. Until the invention of Wells, there was no mechanism to control or change this primary direction of the air. Either the upward or the downward current of air was divergent from the proper direction. This direction should have been towards the revolving cone. A flow of air in any other direction scattered and wasted the fibres.

The remedy for this divergence was an instrumentality which would *conduct*, or *direct*, the currents of air from the front of the picker towards the cone, till the fibres were brought so near to the cone that the force of suction towards it would sufficiently predominate. Here the distinct meanings of the words "direct" and "conduct" should not be disregarded.

An additional purpose for which a new mechanism was required may be explained by observing that an ordinary hat should be thicker at the band than at the crown. The additional purpose therefore was, that the fibres deposited on the cone

should reach it in such layers of varying quantity as to make the bat of the varying thicknesses required;—in the language of Judge Woodruff—to give a greater thickness in that part of the bat where thickness was desired, and a lighter deposit of fur where lightness was more desirable than mere strength.

The purpose of interposing new mechanism was thus twofold. It was to determine towards the cone the general direction of the flow of air from the picker, and also to regulate the different thicknesses of the bat from the base to the top of the cone.

The first person who interposed any mechanism to effect this twofold purpose was Mr. Wells. It was therefore assumed, after his death, by an assignee of the patent, that the use of any interposed mechanism which produces like useful effects, must infringe the patent, whether the mechanical effect was the same or not, and whatever may have been the mechanism used. This was a mistaken supposition, as the Supreme Court has decided.

The twofold useful purpose may be effected more or less by either of two different mechanisms.

One of them is an air-chamber, called a trunk or tunnel, to conduct the flow of air in which the fibres pass from the picker towards the cone. The other is an unenclosed short plate, or system of short plates, which may be called a fur-projector, placed in front of the picker, and so formed as to turn the currents of air initially in the direction required, in order that they may project the fibres towards the cone.

The air-chamber was the invention of Wells, who designated it as a *tunnel.* The *fur-projector* was a much later invention of Boyden, who gave to it the less appropriate designation of a *fur-director.* The two phrases will hereafter be used indiscriminately.

The air-chamber enclosed the currents of air which would otherwise have diverged from the proper direction, and conducted them so as to deposit the fibres in layers of the varying thicknesses required. The form and adjustment of the tunnel, with its auxiliary and incidental appliances, were sufficiently described in the original patent of Wells.

The tunnel was considered by the Supreme Court the great and peculiar characteristic of the invention. (1 Wallace, 571.) Its novelty and great practical utility are unquestionable. Whether the machine is patented, was automatic, and how nearly others may have made it so by subsequently improving its form and adjustment, or by any new invention, are immaterial questions, unless upon the measure of damages for an infringement.

On the question of infringement there is, of course, no difficulty where any contrivance or adaptation has been used for wholly or partly enclosing and conducting the stream of air in which the fibres pass from the picker, so that they may arrive where the draft caused by the fan will sufficiently attract them to the cone. There may be other infringements less obvious. Thus a tunnel may be much *abridged*, and may yet infringe. And there may be an infringement where the passage from the picker toward the cone is only partly enclosed, or is even wholly uncovered.

In the machine used by the defendant, and, so far as I know, in all the machines upon which questions of infringement of the patent have been litigated, there was no top or cover of what supported or deflected, conducted, directed or projected, the air in which the fibres passed from the front of the picker towards the cone. This absence of the top or cover will here be explained. In all of these machines, the revolution of the front of the picker has been downward. The front of the picker of Wells, on the contrary, revolves upward. From the bottom and front of his picker the direction of the flow of air is forward and upward; and this direction afterwards continues unchanged. In the other machines, the different direction of the rotation of the picker causes the primary direction of the flow of air in front to be forward and downward. But, in all of them, the primary direction of the aerial currents downward is immediately more or less changed upon the surface of a gradual deflector of some kind, whose inclination is somewhat upward. Neither the difference in the direction of the picker's rotation, nor the consequent primary difference in the aerial

current's direction, can, in itself, affect the question of infringement. But the gradual deflection upward of this aerial current causes a pressure of the air upon the curved or gradually elevated deflector. This aerial pressure upon the surface of the deflector, though a diminishing one, loses a part only of its first intensity, because the primary direction is not reversed, but only partly changed. Indeed, the curvature may be such that the intensity of the pressure diminishes very slightly. The air, if thus deflected on the bottom of a trough, retains a great part of its primary downward tendency, with a corresponding pressure opposing more or less its natural expansiveness upward. Such a trough, although without any top or cover, may thus perform, in part, the office of a tunnel or air-chamber, in conducting the fibres towards the cone so as to infringe the patent of Wells. The elevation of the sides may thus also be, in part, or even wholly dispensed with. A flat plate, or board, without elevated sides, may be so inclined and adjusted, and so prolonged in the direction towards the cone as to be an infringement. I understand this to have been virtually decided at law in a case of Wells *v.* Gill, tried in the Circuit Court for the Southern District of New York, before Judge Woodruff, and in a case in equity at the suit of the same plaintiff against the sons and copartners of the same defendant in the Circuit Court of New Jersey, in which latter case a preliminary injunction was conditionally ordered by Judge Strong with Judge Nixon's concurrence.

Upon this decision it may be observed that the last reissue of the patent claims, quite unnecessarily, the bottom of the tunnel, as an invention distinct from that of the sides and the top. The motive was doubtless to cover cases of partial infringement. The defendant in the case in New Jersey, contended that the reissue embraced more than the original invention. But Judge Strong said he was unable to perceive how anything decided in the case in the Supreme Court determined that what is claimed in the reissue was not embraced in the original invention.

Unless, however, the office of the mechanism used is thus

(or otherwise) in whole or in part, that of such a tunnel or chamber as the patent of Wells describes, there can be no infringement of his patent. It is only for the mechanism devised by him. *Alternative* but different mechanisms which produce in whole or in part the same, or similar useful effects, are not mechanical *equivalents* in that sense in which their use constitutes infringement. These points the Supreme Court has decided as questions of law.

The *fur-projector*, whether formed of one plate, or composed of several, does not, like the tunnel, enclose aerial currents; nor does it, like the trough, or like the supporting plate, sustain them during any continued flow. In all cases in which the fur-projector may be mentioned, it will be assumed that the picker's revolution is downward. Immediately in front of the picker, the fur-projector receives the downward current of air, changes the primary direction of this current, and initially determines the planes of its ulterior direction. The mechanical theory is twofold; first, that of a projectile force of air towards the cone, or a theory somewhat analogous, the general direction of the air's motion, which was downward, but is gradually turned upward, being so determined initially by the projector, that the fibres are borne forward, beyond the projector, in the aerial current, towards the cone, till they arrive where suction sufficiently attracts them to the cone; and secondly, dividing the same general aerial current initially into such planes that the quantity of the fibres, in the several paths of their trajection, will be greater as the zones of the bat upon the cone approach its base.

The latter twofold theory has been applied in machines in which curved stationary plates in front of the picker have had a gradual inclination upward. This inclination was increased slightly to compensate for gravitation of the fibres in their trajection through the open air.

Boyden's patent, A. D. 1860, described the projection as upon a single plate, inclined upward, and of both a longitudinal and a transverse curvature. This plate was described in his patent as in front of the picker; and so bent or curved that the surface

would give such a direction to the fur, as thrown on it by the rapid motion of the picker, that the fur would be drawn properly on the cone by the exhaust or suction within it. The plate was curved longitudinally so as to have its highest point at the centre, and was gradually curved downward and outward at each side of its centre with a slightly concave form; and was curved transversely in a series of steps descending from the centre in such planes that the cone might be fed with a supply of fibres gradually increasing from top to bottom.

The point decided by the Supreme Court was, that the use of Boyden's machine, as heretofore described, was not an infringement of the prior patent of Wells. Boyden's patent prefatorily described his invention as an improved mode of directing or guiding the fur to the cone, whereby *trunks* and all other comparatively complicated appliances theretofore used for the purpose were dispensed with, and what he called an exceedingly simple and efficient device *substituted*. Here the word *trunks* was obviously intended to refer to, or include the tunnel of Wells; and Boyden's plain meaning was, that what he had contrived, or devised, was actually intended by him as a substitute for that tunnel. It was therefore argued, that his declared purpose was to evade the right of Wells by the mere substitution of a mechanical equivalent. But the Supreme Court, not contradicting this, considered it unimportant, saying that, "every man has a right to make an improvement in a machine, and evade a previous patent, provided he does not *in*vade the rights of the patentee" (p. 574). That court also said that the phrase "equivalent" and other phrases were often used in such a vague and equivocal manner that they mystify and lead many to absurd conclusions who will not distinguish between things that differ. Page 572, the Court said: "The machine of Boyden has not one of the peculiar devices, or combination of devices, of the Wells machine, nor any substantial identity with it, unless by substantial identity is meant every machine which produces the same effect. . . . That two machines produce the same effect will not justify the assertion that they are substantially the same, or that the devices used by

one are, therefore, mere equivalents for those of the other. There is nothing in the Wells machine, or in its devices, which suggests the peculiar device employed by Boyden." (*Ibid.*)

In order to determine the effect of this decision, it is necessary to read more than the report in 1 Wallace, which, though very able, is too condensed to give a full view of the question. The printed record contains seven hundred pages. The remarkable brief of one of the counsel mentioned in the reporter's note (1 Wallace, 532-33) contained eighty-six closely printed pages, and seventeen plates, many of them with several figures, besides twenty-one wood-cut figures. The references in the record were not to plates, or wood cuts, but to models, and working machines, of which "a large museum" was exhibited in court. (See p. 532 and p. 578.) The extracts from Boyden's patent in the report are not quite full enough to convey to the mind sufficient ideas of his machine.

The important question is, what was, in principle, the decision of the Supreme Court? It was, I think, that Wells's exclusive right was not infringed by any substitution of a mechanism which, without enclosing, or continuously supporting, the motive air, merely determined its direction from the front of the picker so as to project unsupported fibres through an open space towards the cone.

A great deal has been said upon the question whether appliances to prevent lateral efflux of the fibres from Boyden's fur-director, which I call fur-projector, would make it infringe the patent of Wells. In the present case, the curved board, which the defendant substitutes for the fur-director, has, on each side, a raised edge of small, but appreciable height, and inclining inward. Where several plates are used, they may be so bent and inclined as in like manner to prevent lateral efflux. It is not material to inquire whether Boyden's machine, as exhibited in the Supreme Court, had any such lateral appliance, or any device of a similar tendency. Where a fur-projector is not of improper dimensions, this mere prevention of lateral efflux cannot be important on the question of infringement. If the board of the defendant's machine was not prolonged be-

yond the extension required for simply determining the direction of currents of air from the front of the picker towards the cone, the elevated edges would, at most, only *assist* in determining *such* direction. If the function of the board was thus limited, these edges would not have caused it to infringe.

The defendant contends that the board or plate used by him is, in principle, that of Boyden. This depends upon the question how nearly the board approaches the point or line where the force of aerial projection becomes inappreciable, or where the force of atmospheric pressure predominates.

On reaching, now, the true question to be considered, it should be premised that the difference between *conduction* and whatever may be called *projection* or *trajection*, does not, in other cases, depend ordinarily upon questions of measurement. But, in the machines in question, so short is the path of the fibres, after they leave the picker, until the force of suction towards the cone predominates, that a change in relative proportions and distances, may, with or without a difference in the measures of the respective forces of aerial projection and atmospheric pressure, involve a difference in mechanical principle.

Thus, if a so-called fur-director is *elongated* towards the cone, and *supports* the air which carries the fibres forward until the force of atmospheric pressure, impelling them to the cone, predominates, they are not *projected* by and through the air. In such a case, the mechanical theory of Boyden either ceases wholly to apply, or the distinction between his mechanism and that of Wells ceases to be a practical difference.

The experimental operation of the machines which were exhibited in the Supreme Court, however fairly the experiments may have been made, was not likely to develop this proposition, or to explain its application. The experiments were exhibited on the part of the defendant whose only business it was to displace the complainant from the broader and independent position which he had taken. He had staked his case upon this broader question; and, on its decision, was content to stand or fall. Upon this question it mattered not whether aerial projec-

tion or atmospheric pressure was, at any point or line, the dominant force. Differences hereafter suggested as material would probably, therefore, not have been observed from the bench in witnessing those experiments.

Let it be assumed, for example, as to Boyden's machine, that the normal force of aerial projection is that which is due to the picker's velocity of, say two thousand revolutions in a minute; the effect of this velocity of rotation being somewhat reduced by the subsequent deflection upward of the currents of air. Let it also be assumed that the normal intensity of the atmospheric pressure upon the revolving perforated cone is that which is due to a certain weight. Let it be supposed, also, that the maximum velocity of the picker's rotation, disregarding differences in diameter, may be three thousand revolutions in a minute, and the minimum atmospheric pressure on the cone may be that which is due to one-half of the weight above supposed. The figure on 1 Wallace, 549, corresponding with a drawing annexed to Boyden's patent, may then be considered as representing normal proportions of the machine, in one of its proper working conditions, when the picker and the exhausting fan each moves with its ordinary velocity. As the normal velocity of the picker and the fan respectively should, perhaps, always be approximately maintained when the machine is at work, it might not be correct, as to a working machine, to say that there is a minimum velocity of the picker which is only from one thousand to fifteen hundred revolutions in a minute, and the maximum atmospheric pressure on the cone equal to double the first of the supposed weights. But in the experimental museum of machines exhibited in the Supreme Court, the difference between the degrees of intensity of atmospheric pressure would not have been observable; and a difference between sixteen and thirty-three revolutions of the picker in a second might not have been observed. Nor is it probable that a shifting of the position of the cone, bringing it a few inches nearer to the picker, would have been discerned from the bench. These changes might, however, almost, if not quite, convert the fur-projector into a conducting trough.

Leaving the experiments exhibited before the Supreme

Court, we may next consider a working machine whose picker and exhausting fan respectively move with normal velocities, which are constantly maintained; and we may assume that the proportions, and the relative distances of the parts of the machine correspond approximately with those on the same drawing on page 549, except that the so-called fur-director, being elongated towards the cone, is of twice the length of the fur-director which is represented in the drawing. This would nearly coincide with the proportionate length of the board used by the defendant.

Its length is within a small fraction of eight inches, occupying more than a fourth of the whole distance between the periphery of the picker and the middle of the nearest surface of the revolving cone. We do not know the velocity of the fan or that of the picker. The current of air in front of the picker was, when I saw it, apparently feebler than might, from inspection of the drawing annexed to Boyden's patent, be the supposed available aerial force. But this impression upon the mind of so inexperienced an observer, cannot be relied on.

There is less uncertainty in considering the proportional measurement of the board. Such a measurement might, in some cases, be no sufficient criterion. But, in others it may suffice to determine whether such a plate is a *fur-projector* in truth, or is elongated so as to be a mere conducting *air trough.*

If this plate had extended outwardly only four inches, or a very little more, I would not have considered it an infringement. If it had been extended farther, within what limit there is no present occasion to determine precisely, the case perhaps could not have been decided until after a special reference on the question of infringement.

Under such a reference, to a commission of experts, or to a master, the question might, I suppose, be determined experimentally in some very simple manner. A theoretical determination, perhaps, could not be made without considerable difficulty; and experimental shifting and adjustment would probaby be necessary before the most correct abstract theory of such a machine could be applied or tested.

The question, as it stands, may be safely decided by the

Court upon the actual *extension of the board.* Inspection of the defendant's machine, when in operation, shows convincingly, first, that if the board had extended outward only four inches, the waste of the fibres would have been immense; and, secondly, that, in the working condition of the machine, the present board reaches a point, or line, where the force of suction toward the cone predominates.

I am of opinion that this board is not a legitimate fur-projector, but is a conducting air trough in disguise, and that its use infringes the complainant's patent: and that it had been likewise infringed by the previous use of the curved metallic plates in the same part of the machine. In Wells *v.* Jaques, a similar undue prolongation of such plates towards the cone would have been a sufficient reason for letting the verdict stand. The judgment in that case was thus consistent with the prior decision of the Supreme Court.

If there is, in Boyden's patent, language of any such import that the so-called fur-director, although thus elongated, might seem to be included in his claim of invention, there is nothing in the decision of the Supreme Court to support the pretension. The principle of Boyden's machine, as defined by the defendant's counsel, whose argument prevailed in that court, was that the particles of fur and air were susceptible of having *sufficient momentum* imparted to them, to be *projected for definite distances and definite directions through the open air:* (1 Wallace, 561, Mr. Harding's Brief, p. 41). The word *project* is used more than once in the patent with no other meaning. It has already been stated, that the question was not involved in the contention upon the other side in the Supreme Court. If the extension of a fur-director towards the cone was greater proportionally, or the distance between the picker and the cone was less proportionally than in the drawing, or model, it may be doubted whether the complainant's counsel would there have attributed importance to such a difference. But not a word in the opinion, or in the reasoning of the Supreme Court, excludes the consideration of such a difference *here,* if it is really material. On the contrary, the Supreme

Court said expressly that Boyden's machine had, as an improvement, more claim to originality than that of Wells (p. 572). This would not have been said if the so-called fur-director had been considered as a mere trough conducting the air.

If it be suggested that Boyden's patent was not for a fur-director which merely *projected* the fibres, but for a fur-director so formed as to *conduct* them *on it* until they reached the point or line where the force of suction predominates—such fur-director *meanwhile* preserving the inclination and curvature described in his patent—the suggestion will encounter objections in addition to some which have been already mentioned.

One objection is, that his patent provides for so forming the fur-director that "slightly elevating the direction of the fur above its otherwise proper path" compensates for the gravitation of the fibres. Here the familiar figure in 1 Wallace, p. 562, exemplifies the well-known effect of gravity in curving downward the path of a projectile passing through the air. But there is no such path, while the support of the fur-director continues.

Another objection is, that Wells had prescribed such a form of his air chamber as would coincide with the course of the fibres inside. Therefore, the Supreme Court cannot have attributed novelty to Boyden's fur-director simply in this respect. The form of the air chamber of Wells appears in his drawings and model, and was described sufficiently in the reissued patent of 1860, upon which the case before the Supreme Court depended. The words of the original patent of 1846, which are fuller, and more precise, were, in this respect, carefully considered, and in part quoted by the Supreme Court, (p. 566). Referring to those parts of the specification of 1846 which are quoted and italicized in the foregoing statement of the case and bearing in mind that the back of the picker, as there described, was revolving downward, and its front was revolving upward, the coincidence in the form of the chamber with the course of the air in it, is clearly indicated.

The only function of the fur-director to which the Supreme

Court's opinion can be referred is, therefore, aerial projection of the fibres.

Though the present use of the board in question thus infringes the complainant's patent, I do not believe that the defendant has been wilfully contumacious. Nor do I think it surprising that he has misunderstood the question of the complainant's right, if I have succeeded in defining it correctly. The complainant should not suffer from the defendant's mistake. But it should not be visited with any penal consequences, if prompt reparation is made.

The question of infringement by the use of the hot wet covering cloth remains for consideration.

This question is resolvable into three points mentioned at the close of the above statement of the case. Upon these points I am of the following opinion:

First. The hair was to be previously disintegrated; and the alternative use of disintegrated fur would have occurred to the mind of any reader, even though it had not been suggested, as it was, elsewhere in Ponsford's patent.

Secondly. If injurious abrasion would have occurred from the use of a cloth sewed in the form of a cowl, any person of the least skill in the art, would have known it, and would, therefore, have understood the use intended as that of an open cloth, to be gently folded in the form of a cowl, upon the bat.

Thirdly. It appears to have been proved experimentally, that the cowl could be thus formed in the first instance of a dry wrapping cloth. As this wrapper and the bat, and the inner and outer cone were by Ponsford's direction, to be at once immersed in the boiling water, the difference between a wet and a dry cloth wrapper was, perhaps, of little importance. If it was important, then, as the boiling water was at hand, and its uses were already well known to the hat maker, the *wetting of the covering cloth with hot water*, was either implied, or must have obviously suggested itself to any reader of Ponsford's patent, who was skilled in the art.

Therefore, this use of such a cloth was not novel at the date of Wells's patent.

The defendant has, however, by making and using the board in front of his picker, infringed the complainant's patented exclusive privilege, and violated the injunction; and is therefore adjudged in contempt. But no attachment or other process will issue upon this adjudication till after a definitive consideration of what may be necessary in order to purge the contempt.

If the defendant at once files a sworn account, such as would be requirable of him before the master under a reference upon a decree for an account, process of contempt will probably not be asked for by the complainant. Upon the filing of such an account, the complainant may apply for a reference. And either party may apply at any time, for further directions.

DISTRICT COURT. FEBRUARY 3, 1873.

ADMIRALTY.

PURCELL, MASTER OF THE RIVER GANGES, *v.* HERBENOT AND OTHERS.

1. In a process for a tort of a criminal nature against mariners by the master of the vessel, cognizance of the question for the restoration of the mariners to the vessel to await the criminal justice of her national government is peculiarly of admiralty jurisdiction.

2. No treaty of extradition is required where the cause is of admiralty jurisdiction.

3. An arrest of the defendants by the marshal within the precincts of the court of quarter sessions while in attendance there on a similar charge against them, is not a contempt of that tribunal if peaceably made.

4. In a controversy between the master and mariners of a foreign vessel questions of personal liberty, where not serious in their nature, although not beyond the judicial power of the District Court in admiralty, are entertained rather of grace than of right.

LIBEL, praying for an attachment in personam. The allegation was that the seamen, defendants, were shipped on the barque River Ganges, a British vessel in the port of Philadelphia, whose voyage was not ended. That there was a desertion from the vessel by the defendants, which apparently was not voluntary, but procured by persons who came

on board and presenting pistols at the men compelled them to leave. Nothing more appears of record, but the case will be sufficiently understood from the two opinions of the Court which follow.

CADWALADER, J.

Case of William Jamison, Alexander Rubeck, and John Quirk, mariners of the British barque River Ganges, arrested under a warrant obtained at the instance of Anthony Purcell, master of the said barque, upon a charge of desertion.

1873, February 3. Mr. Rich, for these mariners, moves for their discharge from their present custody on the ground that their arrest was a breach of their privilege of exemption from process in returning from a hearing before one of the courts of the Commonwealth of Pennsylvania, to wit, the Court of Quarter Sessions of Philadelphia, under a writ of habeas corpus, the proceeding in that court having resulted in their liberation from detention under a commitment by an alderman of the city of Philadelphia.

It appears that the arrest now complained of was made while they were returning from the court which thus liberated them. Their privilege of exemption, if they had any, was therefore the same as if the arrest had been made within the precinct of the local Court of Quarter Sessions.

A mariner of a foreign vessel whose voyage is unfinished has no legal foothold on shore when she is at a friendly port. But, in this case, I would not act upon that rule because the proceeding and commitment from which they were discharged by the State court was at the instance of, and promoted by, the master of the vessel.

The question, therefore, is, whether the present arrest was upon a proceeding for a tort of a criminal nature. The ultimate decision may be that there was no criminal desertion. But the proceeding, until such a decision, is upon a charge of desertion as a crime. Cognizance of this question for the restoration of mariners to the vessel to await the criminal justice of her national government is peculiarly of admiralty jurisdiction.

The crime is properly charged in a libel at the suit of the master of the vessel; and no treaty of extradition is required where the crime is of admiralty cognizance. It is of such cognizance, not for any ultimate jurisdiction of the offence, but preliminarily for the exercise of jurisdiction of the question of restoration to the vessel.

Such proceedings, in a great majority of cases, eventuate so as to show that there is no question of criminal desertion at all, but only a question whether the service of the mariner in the vessel is legally terminated. The present may be such a case. But this question cannot be prejudged. The case at present is that of arrest on a charge of a criminal tort.

Therefore an arrest in the precinct of the Court of Quarter Sessions would not have been a contempt of that tribunal if made without disturbing its peace, and would have been allowable by that court if the nature of the case had been fully explained. I cannot consider the arrest as an abuse of the process of this court.

But I direct the marshal of this court, as its officer, to interpose no objection to the jurisdiction of the Court of Quarter Sessions, if that court should award a writ of habeas corpus.

FEBRUARY 7, 1873.

The jurisdiction of a controversy between the master and mariners of a foreign vessel, where the abstract question of personal liberty is not more seriously involved than in the present case, though not beyond the judicial power of this tribunal, is exercisable rather of grace than of right. In this case the question of the continuance of the relation of the defendants to the vessel as part of her crew depends upon a point of great doubt arising from the decision of the English Court of Admiralty in the case of the Westmoreland. If it were not for that case, I would consider all objection to the contract in question as obviated by the limitation of the time of service in the articles.

But on considering that case I think the question of the law of the country of the vessel so doubtful, that I decline to as-

sume jurisdiction, thinking it safer to remit the decision of the question to what Lord Stowell called the domestic forum (1 C. Robinson, 279.)

The libel is therefore dismissed without prejudice and without costs.

CIRCUIT COURT. APRIL 25, 1873.

EQUITY.

CAMBLOS *v.* THE PHILADELPHIA & READING RAILROAD CO.

DINSMORE *v.* SAME.

1. Of two bills in equity filed at the same time, one was at the suit of an express carrier against a railroad company to prevent the continuance by them of a competing business in which they were engaged, as he alleged, without authority in their charter, also to compel the allowance by them of certain disputed facilities and accommodations which he claimed in his own business upon their line, and also to prevent the continuance by them of certain alleged overcharges for transporting his express freights. The other bill was against the same company at the suit of one of their stockholders. It contained the same allegations and prayed like relief. He was a party in the interest of the express carrier, and pending the disputes, had bought the stock in order to promote that interest by thus bringing suit. A preliminary injunction asked under each bill was refused under both, because if either complainant had any equitable right, it was not, in such a case, enforceable until final hearing.

2. A mandatory order, as a method of enforcing the concession of a right, is generally inconsistent with the object and appropriate functions of a preliminary injunction; and unless there is an extraordinary special exigency, will not be made interlocutorily.

3. Under a bill against a corporation by a stockholder, a preliminary injunction is not ordinarily grantable where the question is not that of preventing forfeiture of the charter from being incurred, but only that of alleged erroneous administration of corporate faculties.

4. Here if the defendants had infringed their charter, the mischief was already done, and preliminary injunction could not avert a forfeiture. The value of their stock in other respects, could not be impaired by their participation in the profits of a competing business. Their liability to an action at the suit of the express carrier was a risk which the stockholder had voluntarily sought. Therefore, if he were a complainant for his own interest he could not ask a preliminary injunction.

5. If any act of the defendants, prejudicial to the express carrier was also an infraction of their charter, he was not, on the latter account, entitled to any redress. As to him, the only questions were those of alleged injury

to his business of a freighter; and those questions, unless there had been a judgment at law, were not of such urgency as necessarily to require interlocutory decision.

6. The charter of a railroad company authorized them to charge certain limited rates of toll to others for passage over the rails; but did not limit their charge for transportation by themselves. The absence of a limitation of the latter charge did not enable them, as common carriers, to make unreasonable charges.

7. A statutory limitation of a railroad company's charges impliedly excludes, within the limit, any question of their unreasonableness, unless rebates from the maximum, or additions to, or rebates from any lower established rates, are systematically unequal. Here equality is understood in a relative sense, as importing that, under like circumstances, a like rate, according to weight or bulk, is charged to all persons for the carriage of goods which are of like descriptions for purposes of transportation. Occasional inequality, even though preferential, is not always necessarily unreasonable. But systematic relative inequality cannot be reasonable.

8. The absolute monopoly of such a company, as owner of the road, includes only the profit from tolls properly so called.

9. Any further monopoly is founded only in the great relative necessity, that, for the security of persons and property, a railroad company should have exclusive control of the motive power and of the track.

10. The monoply of the company, as a common carrier, depends wholly upon this relative necessity, and cannot be extended beyond its exigency.

11. But the company may, as a common carrier, exercise any accessorial functions profitable to themselves and useful to the public.

12. Freight which is transportable partly upon their own road, and partly beyond it, can be received by them as consigned for the ulterior destination.

13. They may, as common carriers, engage in the accessorial business, with horse-power, of collecting freight which is to be transported upon their own railroad, and delivering freight at the places of destination.

14. But they cannot monopolize wholly or partly this accessorial business, or promote the monoply of it by any one else, or appropriate preferential advantages for conducting it, to their own profit, or to that of any one else.

15. Express carriers are not, through any present magnieude, or prospective expansion, of their business, entitled to any such preferential facilities or accommodations from a railroad company as would preclude or impede participation by the railroad company, or by any of the public, in conducting such business with equal advantage on any scale great or small.

16. The charge by a railroad company for such accessorial service with horse-power cannot be imposed upon any of the public who decline to use it.

17. There is no difference between such a direct over-charge and an indirect one made by refusing abatement from a single aggregate charge which includes it.

18. *Quære,* whether a rebate of less than the whole amount or value of the charge for the service dispensed with can be reasonable.

19. *Quære,* whether an express carrier who does not himself encroach on rights of the public, and who submits to all necessary and proper regulations of the railroad company, cannot, without obtaining a judgment at law, have relief in equity against an over-charge.

20. An express carrier who does not submit, or offer to submit, to such regulations, but insists on having preferential accommodations or facilities which could not be allowed without encroachment on rights of the railroad company, and of the public, cannot be relieved before the final hearing.

21. *Quære,* whether he can have relief at the final hearing. It seems that he may, in cases in which part of the decree relieving him may be an adjudication against his pretensions which are unfounded.

22. The charge of a railroad company for transporting packed parcels by rail, of the full sum which would be payable in the aggregate if they were not packed and were charged for severally, cannot be rightfully imposed upon the public generally, or upon express carriers or other middlemen.

23. A court of law, and not a court of equity, has primary cognizance of the question of the right of the railroad company carrying packed parcels for a middleman who does not own them, to charge him with any addition, however small, to what would otherwise be the regular charge for carrying the package in mass.

24. The legal right of the railroad company under the last head is not so clearly deniable as to warrant the summary decision of it against them by a court of equity.

25. A joint stock company was organized under laws of a State, one of which provided that nothing contained in it should be construed to give to such company any rights and privileges as a corporation. The same laws authorized such a company to sue in the name of their president. *Quære,* whether such a company was a citizen of that State within the meaning of the eleventh section of the judiciary act of September 24, 1789, defining the jurisdiction of the Circuit Court.

Upon the application of the complainant in each case for a preliminary injunction, affidavits on his part, and on that of the defendants were exhibited.

The complainant in the first case—a citizen of the State of New York—had, on August 28, 1872, become the holder of one hundred shares of the stock of the defendants.

The complainant in the other case, also a citizen of the State of New York, is president of a joint-stock company associated and organized in pursuance of laws of that State, under the name of "The Adams Express Company," with power to sue in the name of their president. These are ch. 258 of the laws of 1849, and ch. 245 of those of 1854. The latter act provides

that nothing contained in it shall be construed to give to such a company any rights and privileges as a corporation.

On the part of the defendants it was alleged that the shares of their stock held by the complainant Camblos were acquired by him on account and in the interest of the Adams Express Company, solely with a view to enable him to sue here ostensibly as a stockholder of the defendants, but really as an agent of the Adams Express Company, by whom the expenses of the suit in his name were to be borne.

In the following statement of the case, the word complainants, unless otherwise distinctly applied, will be understood as designating the Adams Express Company.

The two bills were precisely alike in their allegations and prayers of relief. They stated that, from the limitation of the proper business of railroads and other improved highways under corporate authority, to the routes between their termini and intermediate stations, there has been established for many years past an extensive independent business known as the express business; that those who conduct it serve the public as common carriers, by gathering small parcels, money, and commercial securities, at local offices and the consignors' doors, and delivering them to the consignees' doors, away from the stations on railroads or other great highways, as well as by collecting bills of exchange, notes, and commercial paper, and assuming responsibility for the risk of the loss thereof to their customers; and, where railroads exist, conveying the express packages thereon, and principally in the cars of the railroad companies; that, the business being principally valuable to the community from the speed with which the packages are forwarded, it has been principally conducted in cars attached to, or forming part of, the passenger trains, as distinguished from the ordinary freight trains of the railroad; that the express business is valuable from the responsibility with which it is conducted, and the facilities it affords; that it required from those establishing it a large outlay without immediate remuneration, in acquiring the confidence of the community, and the organization and requisite information of their agents; and that the complainants for many years past have thus acquired

"an enormously valuable express business extending throughout the country, to the great advantage of the public," conducting it in their own name, and also in that of other private associations whose interests have been acquired, and some of whose names have been retained by the complainants for their own convenience.

The defendants were incorporated under an act of the Legislature of Pennsylvania of April 4, 1833, with power to make a railroad from Philadelphia to Reading, and with all incidental privileges, franchises, and immunities, but none other than such as might be necessary or incident to the making and maintaining of the road and the conveyance of passengers, and the transportation of the mail and of goods, etc., thereon. The act gives to the defendants power from time to time to establish and alter or amend rules and regulations for the due ordering of all traveling and transportation upon and for the preservation of the road, and to prescribe the kinds and descriptions of cars, etc., to be used on it, and to regulate speed and transit; provided that the toll on any species of property should not exceed an average of four cents per ton per mile, nor upon each passenger an average of two cents per mile. It was enacted that after a certain time an annual report should be made by the company, under one head of which the amounts received for tolls and transportation, and the rates charged, were to be stated.

By subsequent acts of the legislature passed in 1837 and 1838, the defendants were authorized to extend the railroad to Pottsville, with all the privileges granted, and subject to the same restrictions imposed by the above-mentioned act of April 4, 1833.

An act of April 3, 1862, P. L., p. 234, extended to the defendants the privileges which had been granted to a navigation company by the first section of an act of April 5, 1859, P. L. 372, enabling them "to contract for the transportation of coal and other articles upon their navigation, and to and from points beyond the same, and to include the charge for such transportation in their charge for tolls."

The defendants were "operating" their railroad and certain connecting railroads of great extension, when an agreement of August 1, 1866, was made between them and the complainants transacting the express business under one of their own names.

By this agreement, the complainants were, for the carriage of a safe not exceeding seven cubic feet in capacity, and other express freight, and the messenger or agent accompanying the same, to have the use on one of the defendant's passenger trains of an eight-wheeled car, and on each of several others of their passenger trains of a certain fractional part of such a car. There were provisions for the retention by the defendants of the absolute control and regulation of the trains and lines. The weight of the express matter, including the safe and its contents, was not to exceed 12,000 pounds in any one eight-wheeled car, nor more than a proportional weight in any fractional part of such a car. There were various provisions for expediting and facilitating loading, unloading, and weighing. Payments were to be made monthly by the complainants of not less than $400 for the transportation of their messengers and safes and other freight; and they were, in addition, to pay rates of transportation upon all freight other than the safes and their contents, greater by twenty-five per cent. than the rates charged from time to time by the defendants in their schedules or tariff of freights; provided that the monthly payments should never be less than $2,000, which amount, as a minimum, was to be payable to the defendants whether such rates in addition to the $400 should equal that sum or not. The complainants were to send a messenger and safe, and to furnish express facilities to the public to the extent to which they could, under this contract, be furnished at least once a day each way, between designated points. If the defendants should thereafter transport any express matter for others doing an express business, at more favorable rates than those agreed on as above, there was to be a corresponding reduction of the amounts payable by the complainants.

The 8th article of this agreement provided that the defendants should not be, directly or indirectly, liable or responsible

to any persons whomsoever, for any loss, or damage, or injury, which may happen to any property of any kind, connected with, belonging to, carried for, or offered to be carried for, the complainants under this contract, or otherwise howsoever, nor for any injury happening to or sustained by any employee, servant, or agent of the complainants, or any persons in any manner connected with them, nor for the death of any such person while upon or about the railroad, or property of the defendants, while upon the business of the complainants, whether such loss or damage, damage to property, injury to or death of any such person, should have been occasioned by or through the negligence, or omission, or default of the defendants, their agents or employes, or other persons, or otherwise howsoever, but from all such loss, injury, or damage, should be by the complainants at all times indemnified; it being distinctly understood and agreed, as part of the consideration of the contract, that the complainants assumed and took upon themselves, and undertook to pay, and provide for, and indemnify the defendants against all and every claim and demand for loss and injury of every nature, to life, person, or property, arising from the performance of this contract, or any matter directly or indirectly connected therewith. And the complainants further agreed to indemnify the defendants from all loss or damage to which they might be subjected, for or on account of any injury to persons or property caused by or resulting from any explosive, combustible, noxious or deleterious substance, transported or held by the defendants for the complainants.

The contract was to continue in force until the expiration of sixty days from the date of the service of written notice by either of the parties, on the other, of their wish, that it should terminate, and was then to become void, etc., except for the enforcement of claims then acquired and existing.

The defendants, in the latter part of 1870, became lessees for a long term of all the franchises, railroad, and property of the Philadelphia, Germantown and Norristown Railroad Co. This company was incorporated by an act of February 17, 1831, with authority to make the latter road, and to charge and

receive tolls, and for freights, in and for the transportation of goods, etc., and for the conveyance of passengers, at prescribed maximum rates; provided that all persons using the road for the transportation of persons or commodities should only use such cars, etc., adapted to the road as the company should prescribe. A supplementary act of April 7, 1832, enabled the latter company to own and place locomotive engines on the road and transport persons, merchandise, etc., for prices or compensation to be agreed upon.

Since the lease of this road by the defendants, it has been called the Germantown and Norristown *branch* of their railroad.

Under the date of May 7, 1872, it was agreed between the defendants and the complainants,. by another of their names, that the defendants should provide for the use of the complainants one eight-wheeled car suitable for the business of an express company, and transport the same daily (Sundays excepted) between Philadelphia and Chestnut Hill, on the Germantown and Norristown branch of the railroad of the defendants, twice each way—attached to passenger trains; and also transport for the complainants one eight-wheeled car (to be provided by the complainants themselves), twice each way daily (Sundays excepted), between Philadelphia and Norristown, on the same branch—attached to passenger trains; and issue passes for the transportation, free of charge, of one employe of the complainants in each of the said cars, upon its two daily round trips. If the defendants should, during the continuance of the agreement, enter into an agreement with any person or persons, in an express business, for the transportation over the said Germantown and Norristown branch, of express matter, upon terms more favorable than were therein contained, the complainants were to have their express matter transported upon the same terms. In consideration whereof, the complainants agreed to pay to the defendants during the continuance of this agreement, three hundred dollars upon the first of each month; not to make any demand or bring any suit against the defendants, for any

loss, injury, or damage, from any cause whatever, that might occur to the car furnished by the complainants, or to the goods transported in either of the cars; and to indemnify the defendants from all such demands or suits by any person whatever; and from all demands or suits by reason of any injury to or death of any employé of the complainants; it being the intention and agreement of the parties that the car furnished by the complainants, and the goods contained in either of the cars, as well as the employés of the complainants, should be transported solely at their risk, and without any responsibility whatever on the part of the defendants.

The contract was to continue in force until the expiration of sixty days from the service of written notice by either party, upon the other, of an intention to determine the same; whereupon it should become void, except for the collection of any sum then due by the complainants to the defendants.

This agreement contained a provision that it was to be deemed and taken to have been in force from April 1, 1871.

On June 19, 1872, the defendants gave to the complainants, under each of the contracts of August 1, 1866, and May 7, 1872, notice that it would become void upon the expiration of sixty days.

The defendants allege that there was no more necessity for the intervention of the complainants in the transportation of express freight and small packages than there would have been for such intervention between the public and the defendants in the transportation of coal or passengers in the freight trains; and that it would not have been just to permit the complainants to continue to carry away a considerable profit which really belonged to the defendants' stockholders.

On August 21, 1872, the defendants gave public notice that on and after September 2, they would take charge of the express business in all its details, on their road, and its branches, and would be fully prepared to accommodate the public in the rapid transmission of money and freight entrusted to their care; adding that direct connections would be made with the "Delaware, Lackawanna, and Western Express" for New York City

and State, the Eastern States and Canadas, and all points on the Delaware, Lackawanna, and Western, Lackawanna and Bloomsburg, and Morris and Essex Railroads, and at reduced rates; that particular attention would be given to the collection of cheques, drafts, notes, bills, etc., and prompt returns made; that orders for articles to be returned by express would be carried free of charge, and delivered at once upon arrival of trains, and goods called for and returned by next train, if ready for shipment; and that telegrams ordering shipments of packages by express would be forwarded over the lines of the Philadelphia, Reading, and Pottsville Telegraph Company at half rates. "For further information" application was to be made at the "General Office" of the "Philadelphia and Reading Railroad Express Department," and at the "Branch Office" of the same department.

The defendants explain their connection, mentioned in this notice, with the Delaware, Lackawanna, and Western Express, by stating that it was to facilitate the transportation of express freight to destinations beyond their own railroads on the customary terms, and that they had offered to transfer, on similar terms, the entire business of such ulterior transportation to the complainants, who had refused the offer.

The complainants received from the defendants, in a letter of August 26, 1872, information that upon their regular freight trains, they would carry freights for the complainants in the same manner as "for other shippers," that the complainants could not be furnished with separate cars for their goods, nor could the defendants engage to forward them in any given time, but that they should be loaded and despatched in the same order as consignments to all other parties. "Respecting the running of a private car over the Norristown branch," the words of the defendants were: "We are very much cramped for room at our depot, on Ninth street, and we should on that account prefer handling the goods in our own cars. But, if you prefer to furnish a car, it can be done, although we shall not be able to promise as good despatch as would be given to our own cars, from the fact that an extra shift will be required,

and this could not always be insured in time to get the car out by any particular train."

The complainants inquired generally, and also under specific heads, what facilities would be afforded them for the transportation of their express matter on the passenger trains of the defendants over their several roads and the respective branches. The defendants, in two letters of August 30, 1872, answered that if the complainants desired to continue in the express business in the defendants' region and to make use of the defendants' express department for transportation, the defendants would at all times be glad to transport any of the express matter of the complainants upon the same terms paid by the public, and would endeavor to attend to the receipt and delivery with promptness, despatch, and in all cases, on terms as favorable as to "any other shipper."

The defendants added: "As we do not intend to set apart in our express cars any particular space for any one shipper, we cannot consent to do so for your company. Neither can we permit your messenger to occupy any space in our express cars."

"As we are obliged to keep up a sufficient equipment to receive from and deliver to the public all express matter transported over our lines, we cannot consent to make any abatement to you in consideration of your receiving and delivering goods."

The defendants stated further that it was not their intention to permit the cars of any express company to run with passenger trains.

On September 2, 1872, the defendants commenced, and they have since continued, the business of transporting express matter in cars of their own, run with their passenger trains, each express car being attended by their messenger in charge of the express matter. For the collection and delivery of such matter at the termini of its lines, the defendants employ horses and wagons.

The defendants collect and transport bank-notes or other moneys in payment of cheques, drafts, and bills intrusted to

them; and for so doing receive compensation. Their president's affidavit states that "such money or other securities are transported as any other freight of similar character and value."

The defendants had "instituted" a tariff of charges to the public for the conveyance of express matter. They refused, as they say, to show this tariff to the complainants without refusing to make known to them the charge for any particular item of express matter offered for transportation. An interrogatory of the bill asks a disclosure of all the regulations adopted by the defendants for the management of the express business which they have undertaken.

In September, 1872, the relations of the parties becoming practically controversial, several disputes occurred. In what follows, express freight will be understood as including all articles or parcels of such small weight and limited bulk that they are, or may be conveniently transportable in fast passenger trains, and all orders and securities for money and other written or printed papers, of which transportation otherwise than by mail is not unlawful.

The complainants demanded, as proportional to the magnitude and expansion of their express business, facilities and accommodations on the scale of those which they had conventionally received from the defendants until the annulment of the contracts of August, 1866, and May, 1872. The defendants objected that certain of the facilities and accommodations thus demanded would be *preferential*, and that the allowance of them would therefore be improper. The questions under this head were: whether the complainants could insist on having, in a passenger train, a car for their exclusive use, furnished by themselves or provided by the defendants, or on having a sufficient space set apart for such use in a car of the defendants; whether the complainants could rightfully insist upon loading and receiving their express freights upon platforms or landings of the railway depots or stations—at places where the defendants had established offices or warerooms for the reception and delivery of the freights; whether the complainants could insist upon the booking or way-billing, etc., being done by themselves, instead

of by the defendants; or whether the complainants could require the admission of an agent or messenger in charge of their express freights to the car containing such freights, and require his freedom from those restraints upon ordinary passengers which might hinder his personal care of such freights during their transit by rail; and whether, if such an agent or messenger was admitted only as a passenger paying the ordinary fare, he should be allowed as baggage to be carried in the baggage car, a trunk containing express freight of the complainants, without being charged more than for its excess, if any, in weight above that allowed for an ordinary passenger's baggage and at the same rate.

The other disputes were upon alleged overcharges by the defendants for the carriage of express freights.

Their charge for the accessorial service with horse-power, in carrying freights to and from the railway, was included in a single aggregate sum, which included also the charge for transportation by rail with steam power, without any discrimination between the amounts or values of the two services. The complainants, themselves bringing the freights to, and receiving them at, the railway, and thus making no use whatever of the horse-power of the defendants, objected to the charge for its use, offering to pay the amount which would have been chargeable for the transportation by rail, according to the rates which had been usual until the defendants engaged in the accessorial business. This the defendants refused to accept. They exacted the aggregate sum, without making any abatement whatever. The complainants paid the whole charge under protest. As to the excess, it was contended for the defendants that no rebate whatever was requirable of them, and by the complainants that no rebate less than of the whole excess above the proper charge for transportation by steam upon the rails could be reasonable.

Another dispute arose thus: When several articles or parcels, all receivable at the same place or destination by the complainants, but there deliverable by them to several persons unknown to the defendants, were so bound or inclosed as to

form together a single package not of inconvenient bulk or weight for transportation, the complainants required the defendants to receive such package for transportation upon their road at a rate of charge no higher than if the whole contents were owned by the complainants, or were intended for ultimate delivery to a single person. The defendants refused to carry the package at this rate, exacting the full aggregate amount which would have been chargeable if the several parcels had not been packed together. The whole charge was paid by the complainants, under protest as to the excess. Between the two extremes of the question as to packed parcels, a point argued was whether, if the whole additional charge was excessive and unreasonable, a less addition might not be properly made in order to cover the contingent risk of the defendants' liability to several actions at the suit of the unknown parties interested.

The complainants do not appear to have brought any action at law to get back either of the two excesses in amount which they paid under protest.

Besides the special contestations which have been mentioned, the complainants contended generally that carriage without steam-power to or from the railway is a business wholly distinct from that of carriage by rail; that the charter of the defendants does not authorize them to engage in any other business of carriage than upon the rails, and moreover does not authorize them to receive any freight which is transportable upon their own road and beyond it, as consigned for the ulterior destination.

The purposes of the bills were threefold.

First, by injunction, to prevent the defendants from continuing the competing business with horse-power.

Secondly, to compel, by mandatory injunction or decretal order, the allowance by the defendants to the complainants of the disputed facilities and accommodations.

Thirdly, to prevent, by injunction, the continuance of the alleged overcharges.

The defendants, denying wholly that the complainants' case had any merits, objected that the questions in dispute were pri-

marily cognizable, not in equity, but at law, and if this were otherwise, could not be properly considered until the final hearing; that the complainants could not sue as a citizen of the State of New York, under the 11th section of the Judiciary Act of 24th September, 1789, and could not sue in equity out of that State, in the name of their president.

George L. Crawford and *Benjamin Harris Brewster*, for the plaintiffs.

A. D. Campbell and *James E. Gowen*, for the defendants.

The plaintiffs presented the following points and authorities:—

A. As to the remedy.

I. *The Shareholders' Bill.*

When a corporation attempts to misapply its corporate powers, funds, or credits, in acts, *ultra vires*, violating its charter, or lessening the shareholder's dividends and the value of his shares, it will be restrained upon the application of a single shareholder, by a bill on behalf of himself and the others in like interest. (Dodge *v.* Woolsey, 18 How. 331, 41, 2, 3; Sandford *v.* Catawissa R. R. Co., 12 H. 378; Coleman *v.* Eastern C. R. Co., 10 Beav. 1; Cohen *v.* Wilkinson, 12 Beav. 125; Solomon *v.* Laing, 12 Beav. 377; Graham *v.* Birkenhead, etc., Co., 12 Beav. 460; Munt *v.* Shrewsbury, etc., R. Co., 13 Beav. 1; Logan *v.* Lord Courtown, 13 Beav. 22; Gregory *v.* Patchett, 33 Beav. 595; Bagshaw *v.* Eastern U. R. Co., 7 Hare, 114; Simpson *v.* Denison, 10 Hare, 50; Maunsell *v.* Midland G. W. R. Co., 1 H. & M. 130; Great Western R. Co. *v.* Rushout, 5 De Gex & Sm. 290, 3; Winch *v.* Birkenhead, etc., Co., 5 De Gex & Sm. 562; Beman *v.* Rufford, 1 Simons N. S. 550; Attorney-General *v.* Great Northern R. Co., 1 Dr. & Sm. 154, 6 Jur. N. S. 1006; Charlton *v.* Newcastle R. Co., 5 Jur. N. S. 1096; Hare *v.* London and N. W. R. Co., 30 L. J. Ch. 820; Forrest *v.* Manchester L. and L. R. Co., 7 Jur. N. S. 887; Bloxam *v.* Metropolitan R. Co., 3 Ch. App. (L. R.) 337; Caledonian and D. R. Co. *v.* Magistrates, 2 McQueen, 391; River Dun N. Co. *v.* North Midland R. Co., 1 Eng. Rail. Cas. 135;

Kemp *v.* London and B. R. Co., 1 do. 495; Bell *v.* Hull and S. R. Co., 1 do. 636; March *v.* Eastern R. Co., 40 N. H. 548; March *v.* Eastern R. Co., 43 N. H. 515; Pratt *v.* Pratt, 33 Conn. 446; Giffard *v.* N. J. R. Co., 2 Stockt. 171; Stevens *v.* Rutland and B. R. Co., 1 Am. L. Reg. 154. Though the unauthorized works or business be beneficial to the corporation: Munt *v.* Shrewsbury R. Co., 13 Beav. 1; Beman *v.* Rufford, 1 Simons N. S. 550; Caledonian and D. R. Co. *v.* Magistrates, etc., 2 McQueen, 391.)

That the shareholder purchased his stock for the purpose of filing the bill, and sued at the instigation and request of a rival interest, and that his motives and feelings were adverse to the corporation, is no defence. Coleman *v.* Eastern C. R. Co., 10 Beav. 1; Beman *v.* Rufford, 1 Simons N. S. 550; Winch *v.* Birkenhead & Co., 12 Bevan, 460; Hare *v.* London and N. W. R. Co., 30 L. J. Ch. 820; Attorney-General *v.* Great Northern R. Co., 1 Dr. & Sm. 154, 6 Jur. N. S. 1006; Forrest *v.* Manchester L. and L. R. Co., 7 Jur. N. S. 887; Bloxam *v.* Metropolitan R. Co., 3 Ch. App. (L. R.) 337; Seaton *v.* Grant, 2 Ch. App. L. R. 459; Sanford *v.* Catawissa R. Co., 12 H. 378.)

That the bill was properly framed on behalf of those only in interest, who can take the benefit of the limited jurisdiction. (Bacon *v.* Robertson, 18 Howard, 480.) That the corporation was the proper defendant, and it was not necessary to add the directors. (Bagshaw *v.* Eastern U. R. Co., Winch *v.* Birkenhead, etc., R. Co., Beaman *v.* Rufford, Solomon *v.* Laing, Sandford *v.* Catawissa R. Co., all of which were before cited. See text-books, Drewry on Inj. 194, 286; Walford on Railways, 153, 371, 404, 405; Hodge on Railways, 68 *et seq.;* 2 Shelford on Railways, 114, 125, 163; Godf. & Shortl. on Railways, 72 *et seq.;* 2 Redfield on Railways, 327-336.)

II. *The Express Company's bill.*

That a constitutional or statutory privilege was peculiarly the subject of equitable protection by injunction. (Hilliard on Inj., ch. 25, p. 389. That equity had undoubted jurisdiction to interfere by injunction, where public officers are proceeding illegally under a claim of right to the injury of the rights of

others, where the acts are a breach of trust, or acts of irreparable mischief, or involving a multiplicity of suits, or otherwise invite equitable jurisdiction. (Greene *v.* Mumford, 5 R. I. 475; Mohawk, etc., *v.* Archer, 6 Paige, 83; Conover *v* Mayor, etc., 25 Barb. 513; Frewin *v.* Lewis, 4 My. & C. 254; Hilliard on Inj., ch. 24, 383; Manderson *v.* Commercial Bank, 28 P. S. R. 378; Osborn *v.* United States Bank, 9 Wh. 838-46; Boston W. P. Co. *v.* Boston and W. R. R. Co., 16 Pick. 525.)

That the express company had a right to sue in the name of their president, and that their powers were given by the following statutes of New York: 1849, chap. 52; 1851, chap. 455; 1853, chap. 153; 1854, chap. 245; 1867, chap. 289; 1868, chap. 290; 1869, chap. 157.

B. As to the right.

I. *That the defendants were bound to carry for all owners or express bailees of parcels, including said Adams Express Co., without partiality, preference, or advantage to the defendants themselves, or any one else.*

That railroad companies, though called private as contradistinguished from public, were not such private corporations as manufacturing companies, and were public as distinguished from them, their uses being all public. (Dartmouth College *v.* Woodward, 4 Wheat. 668; Rundle *v.* Del. and R. Canal, 1 Wallace, C. C. R. 275.) That whenever the public, through its agents, deem the franchise of a railroad company injurious, they could, under the unlimited and discretionary clause in most charters, revoke it. (Commonwealth *v.* Wilkinson, 16 Pick. 175; Newburyport Turnpike Corporation *v.* The Eastern R. R. Co., 23 Pick. 326; Inhabitants of Worcester *v.* The Western R. R. Corporation, 4 Metc. 564; S. C., 1 Am. R. C. 350, 352; The Enfield Toll-bridge Co. *v.* The Hartford and New Haven R. R. Co., 17 Conn. 40; S. C., 2 Am. R. C. 69-83; Bloodgood *v.* The Mohawk and Hudson R. R. Co., 14 Wend. 57; S. C., 2 Am. R. C. 415-20; Beekman *v.* The Saratoga and Schenectady R. R. Co., 3 Paige, 45; S. C., 2 Am. R. C. 503-526; Sharpless *v.* Mayor, etc., of Philadelphia, 9 H. 149; Moers *v.* The City of Reading, 9 H. 188; Sandford *v.* Catawissa R. R.

Co., 12 H. 378; Chicago, B. and Q. R. Co. *v.* Parks, 18 Ill. 464; Galena and C. U. R. Co. *v.* Rae, 18 Ill. 490.)

By their obligations as common carriers.

That the defendants being empowered by their charter, with the correlative duty to become transporters upon, as well as to maintain their railway for tolls, and publicly professing to carry for others in respect to the matters complained of, were liable as common carriers. (Johnson *v.* Midland R. Co., 4 Exch. 367; Fuller *v.* Naugatuck R. Co., 21 Conn. 557; Angell on Carriers, p, 84, § 78; Thomas *v.* Boston and P. R. R. Co., 10 Metc. 475; Chicago and A. R. Co. *v.* Thompson, 19 Ill. 584; I. C. R. R. Co. *v.* Frankenburg, 54 Ill. 95.) That "carriers regarded in law as if they were in the public service, and their obligations do not arise *ex contractu.*" (Saltonstall *v.* Stockton, Camp, Rep. 11; Hannibal R. R. Co. *v.* Swift, 12 Wall. 270.)

That it is the duty of a common carrier to receive and carry all goods offered, if he has requisite convenience, upon reasonable charge and conditions. (2 Show. Rep. 327; Story on Bailments, ch. 6, § 508; 2 Kent. Com. 599; Galena and C. U. R. Co. *v.* Rae, 18 Ill. 489-90; Audenreid *v.* P. and R. R. Co., 18 P. F. Smith, 380; Definition of Monopoly, 11 Rep. 86; 3 Inst. 181; 4 Comm. 159; Jacob's Law Dict., vol. 4, p. 307.)

That monopolies are void by the common law, being against the freedom of trade, discouraging labor and industry, and putting it in the power of particular persons to set what price they please on a commodity. (1 Hawk. P. C., ch. 79, § 2, Moor, 591; Michell *v.* Reynolds, 10 Mod. 130. As to instances of involuntary restraints by charter which are void, see 2 Rol. Abr. 214; 3 Inst. 182; 11 Rep. 84; Moor, 671; 1 Jones, 231; 3 Mod. 75; 11 Rep. 84; Willes, 384; 1 Saund. 312c; 1 Rolle, 364; Lutw. 562; 1 Comb. 269; 5 Mod. 104-6; Comb. 372; 1 Ro. 4; 1 Ld. Raym. 113; Moore, 576; 1 Bulst. 11; Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19; Angell & Ames on Corp., § 336; Durham *v.* Trustees of Rochester, 5 Cowen, 462; Hayden *v.* Hays, 5 Conn. 391; Grant Corp. 80. In reference to charge for parcels, see Crouch *v.* London and N. W. R. Co., 2 C. & K. 789 (1849); Parker *v.* Great Western

Railroad Co., 7 M. & G. 253 (1844); Edwards *v.* Do. 73, E. C. L. R. 588 (1851); Parker *v.* The Bristol and Exeter R. Co., 6 Exch. 702 (1851); Crouch *v.* London and N. W. R. Co., 25 E. L. and Eq. 287 (1854); Crouch *v.* Great Northern R. Co., 25 E. L. and Eq. 449; 9 Exch. 556 (1854); Finnie *v.* Glasgow and S. R. Co., 34 E. L. and Eq. 21 (1855); Crouch *v.* Great Northern R. Co., 11 Exch. 742 (1856). In regard to undue preference, see Ransom *v.* Eastern C. R. Co., 1 J. Scott, N. S. 437-38; E. L. and Eq. 231 (1857); In re Oxlade, 87 E. C. L. R., 1 J. Scott, N. S. 454 (1857); Marriott *v.* London and S. W. R. Co., 1 J. Scott, N. S. 498 (1857); Baxendale *v.* The North Devon R. Co., 3 J. Scott, N. S. 324 (1857); Harris *v.* Cockermouth and W. R. Co., 3 J. Scott, N. S. 694 (1858); Piddington *v.* Southeastern R. Co., 5 C. B. N. S. 111 (94 E. C. L. R.) (1858); Baxendale *v.* Eastern C. R. Co., 5 J. Scott, N. S. 309 (1858); Baxendale *v.* Great Western R. Co., 5 J. Scott, N. S. 336 (1858); Garton *v.* Great Western R. Co., 5 J. Scott, N. S.; Garton *v.* Bristol and Exeter R. Co., 6 J. Scott, N. S. 639 (1859); Exch. Ch. 5 Jur., N. S. 1172; H. L., 7 Jur., N. S. 173; Do. *v.* Do., 1 Ellis, B. & S. 112 (1861); Baxendale *v.* Great Western R. Co., 14 J. Scott, N. S. 1 (1863); Sutton *v.* Great Western R. Co. and Southeastern R. Co., 3 H. & C. 800 (1865); Baxendale *v.* Southwestern R. Co., Jurist, April 7, 1866, 274 Exch.; Palmer *v.* London B. and S. C. R. Co., 40 L. J. N. S. 133, 6 L. R. C. P. 194 (1871); Parkinson *v.* Great Western R. Co., 40 L. J. N. S. 222, 6 L. R. C. P. 554 (1871); Sanford *v.* Catawissa R. R. Co., 12 H. 378; New England Express Co. *v.* Maine C. R. Co., 57 Maine, 188; 10 Mees & W. 397; 3 English Railway Cases, 193; 49 Eng. Com. Law Rep. 253; 73 Eng. Com. Law Rep. 583; Bennett *v.* Dutton, 10 N. H. 481; Vincent et al. *v.* C. and A. R. R. Co., 49 Ill. 37; Webber *v.* Gage, 39 N. H. 182; Watson *v.* Sunderland, 5 Wallace, 74; Chicago and Northwestern Railway Co. *v.* People, ex rel. Hempstead, 10 Am. Law Reg. N. S. 588.)

That a common carrier "exercises a public employment." Coggs *v.* Bernard, 2 Lord Raymond, 909.

II. *That the defendants have no powers but those the strictest construction of their charters exhibits.*

(Charles River Bridge *v.* Warren Bridge, 11 Pet. 420-544; Richmond R. R. Co. *v.* Louisa R. R. Co., 13 How. 71; Ohio Life Ins. Co. *v.* Debolt, 16 How. 435; Rice *v.* R. R. Co., 1 Black, 358-380; Jefferson Bank *v.* Skelly, do. 436-446; Oswego Bridge Co. *v.* Fish, 1 Barb. Ch. 547; Shorter *v.* Smith, 9 Ga. 517; Mayor *v.* Macon and Western R. R. Co., 7 Ga. 221; Thorp *v.* Rutland R. R. Co., 27 Vt. 140; State *v.* Chase, 5 Ohio, 528.)

That their charters are to be construed by the laws of the States granting them. (Smith *v.* Kernochen, 7 How. 198.) That Pennsylvania had judicially declared the rule of strictest construction. (Packer *v.* Sunbury, etc., R. R. Co., 19 P. S. R. 211-18; Penna. R. R. Co. *v.* Canal Commis., 21 Id. 9, 22; Commonwealth *v.* Franklin C. Co., Id. 117; Commonwealth *v.* Erie N. E. R. Co., 27 Id. 339, 51; Commonwealth *v.* Central P. R. Co., 52 Id. 506.)

That the rule of strictest construction applies to the right to take toll, freight or fares. (C. and A. R. R. Co. *v.* Briggs, 2 Zabr. 623.)

That the rule applies to an alleged grant interfering with public trades, or commerce, or convenience. (Stormfeltz *v.* Manor Turnpike Co., 13 P. S. R. 533; McLeod *v.* Burroughs, 9 Ga. 213; Justices *v.* Griffin, etc., Road Co., id. 475, etc.)

That the rule applies to railroad franchises. (Hodge on Railways, 68 *et seq.*, and cases cited. Godf. & Shortt on Railways, 61; 2 Shelford on Railways, 2, 114, 125, *et seq.*, and cases cited. 1 Redfield on Railways, 50, 235, 7, 8; 405, 9, 28; 354, 4, 518, 614. 2 Redfield on Railways, 445; Coleman *v.* Eastern C. R. Co., 10 Beav. 1; Murt *v.* Shrewsbury and R. Co., 13 Beav. 1; Simpson *v.* Dannison, 10 Hare, 1; Maunsell *v.* Midland and R. Co., 1 H. & M. 130; Beman *v.* Rufford, 1 Simons N. S. 550; Forrest *v.* Manchester R. R. Co., 30 Beav. 40.)

That an incident to be carried by a principal grant must be necessary and proper, and usually appurtenant. Sumner *v.* Marcy, 3 W. & M. 105.)

That the defendants received their corporate franchises with the duty to exercise them (Cohen *v.* Wilkinson, 12 Beav. 125; Graham *v.* Birkenhead, etc., Co., 12 Beav. 460; Regina *v.* Bris-

tol Dock Co., 2 Eng. Rail. Cas. 599); and, having completed and operated their railroads for over a generation, never before exercised or claimed to exercise the franchise in question, and recognized the plaintiff's right thereto.

That the power to make a road and take tolls does not authorize establishing a line of stage coaches thereon. Downing *v.* Mount Washington Co., 40 N. H. 230; Wiswall *v.* Greenville, etc., Road Co., 3 Jones N. C. (Eq.) 183.)

That the carriage of goods by an agent of a railroad company, from a point distant from the line of the road, to be transported on the line, was distinct from the general objects of the company. (Miss. Coal Co. *v.* Hannibal and St. J. R. Co., 35 Mo. 84.)

That the old rule that a carrier must deliver was not applicable to railroad companies, because they had fixed tracks and fixed points of termination. (Norway Plains Co. *v.* Boston and M. R. R. Co., 1 Gray, 263; Hempstead *v.* Chicago and N. R. R. Co., 55 Ill. 95; Mayor *v.* Macon, etc., R. R. Co., 7 Ga. 221.)

III. *That the duty of the defendants to permit the Adams Express Company's express car to be drawn on any train whereon the defendants carry their own express car, and for charge not exceeding their statutory toll per ton per mile, with reasonable compensation for motive power and incidental service, equal to such part of their charge to others for whom they perform the entire collection, carriage, and delivery, as was fairly referable to that part of said entire services—followed from their statutory obligation, and that equal justice required by the nature of their franchise, their obligations as common carriers, and the principles of public policy.* (Hodge on Railways, 504, 539.)

That the equity jurisdiction, power, and practice of the Circuit Court of the United States, under the Constitution, art. 3, § 2; the Process Acts of Sept. 24, 1789, § 11; May 8, 1792, § 2; May 19, 1828, §§ 1, 3; June 1, 1872; and the Rules of Court, were in nature, extent, and forms of procedure as administered in the English Court of Chancery, and thus the same in all the circuits, and not as modified in the several

States. (1 Kent's Comm. 342; Story's Equity, § 57; Robinson *v.* Campbell, 3 Wheat. 221; U. S. *v.* Howland, 4 Wheat. 115; Boyle *v.* Zacharie, 6 Pet. 657-8; Livingston *v.* Story, 9 Pet. 655-6; Story *v.* Livingston, 13 Pet. 368-9; *Ex parte* Whitney, 13 Pet. 407-8; Gaines *v.* Relf, 15 Pet. 14, 7; Penna. *v.* Wheeling Bridge Co., 13 How. 563-4; Fontain *v.* Ravenal, 17 How. 384; Barber *v.* Barber, 21 How. 590-1-2; Thompson *v.* Railroad Co., 6 Wall. 137; Walker *v.* Dreville, 12 Wall. 442; Mayor *v.* Foulkrod, 4 W. C. C. R. 354-5-6; Gordon *v.* Hobart, 2 Sumner, 405-6; Flecher *v.* Morey, 2 Story, 567; Cropper *v.* Coburn, 2 Curtis, 472; Loring *v.* Marsh, 2 Clifford, 492; Lorman *v.* Clarke, 2 McLean, 570-1-2-3; Dow *v.* Chamberlain, 5 McLean, 285; U. S. *v.* Parrott, 1 McAll. (Cal.) 287-8-9.)

In regard to the protection of rights by injunction, they cited: Durrell *v.* Pritchard, L. R. 1 Ch. 244-50; Great North of England R. Co. *v.* Clarence R. Co., 1 Coll. Ch. 507; Spencer *v.* L. and B. R. Co., 8 Sim. 193; London and N. W. R. Co. *v.* Lancashire and Y. R. Co., 36 L. J. 479; Dewhurst *v.* Wrigley, 1 C. P. C. 319; Robinson *v.* Lord Byron, 1 Bro. C. C. 588; Mexborough *v.* Bower, 7 Beav. 127; Westminster, etc., Co. *v.* Clayton, 36 L. J. Ch. 476; Ranken *v.* Harkisson, 4 Sim. 13; Martyr *v.* Lawrence, 2 De G. J. & S. 261; 10 Jur. N. S. 858; Hervey *v.* Smith, 1 K. & J. 389-92-4; Attorney-General *v.* Borough of Birmingham, 4 K. & J. 547; Goodale *v.* Goodale, 16 Sim. 316; Whittaker *v.* Howe, 3 Beav. 383-9-395; Greatrex *v.* Greatrex, 1 De G. & Sm. 692, 11 Jur. 1052; Evett *v.* Price, 1 Sim. 483; Sloo *v.* Law, 5 Black, 459-86; Manderson *v.* Commercial Bank, 28 P. S. R. 379; Baxendale *v.* North Devon R. Co., 3 J. Scott, N. S. 333; Ransome *v.* Eastern C. R. Co., 38 Eng. L. and Eq. 231-6; In re Oxlade, 87 E. C. L. R. 1 J. Scott, N. S. 497; Harris *v.* Cockermouth R. R. Co., 91 E. C. L. R., 3 J. Scott, N. S. 693; Baxendale *v.* Great Western R. Co., 94 E. C. L. R., 5 J. Scott, N. S. 335; Garton *v.* Great Western R. Co., 94 E. C. L. 669; Same *v.* Bristol and E. R. Co., 95 E. C. L. R., 6 J. Scott, N. S. 639; Palmer *v.* London B. and S. C. R. Co., 40 L. J. N. S. 133; 6 L. R. C. P. 194; In re Marriott, 87 E. C. L. R., 1 J. Scott, N. S. 514; Parkinson *v.* Great Western R. Co., 40 L. J. N. S. 222, 6 L. R. C. P. 544.

The defendants presented the following points and authorities in regard to the plaintiff Camblos:—

I. That a court of equity could not be asked to interpose by a preliminary injunction to protect a suitor from risk incident to a position which he had voluntarily assumed for the purpose of incurring the risk which he complained of. (Kenton *v.* The Passenger Railway Company, 4 P. F. Smith, pp. 453-4; Stuart, V. C., in Tfooks *v.* The London and Southwestern Railway Company, 19 Eng. L. and Eq., p. 14; Knight Bruce, L. J., in Rogers *v.* Oxford, Worcester, and Walverhampton R. R. Co., 2 De Gex & Jones, 662; Forrest *v.* Manchester, Sheffield, and Lincolnshire R. R. Co., 4 D. F. J. 126, decided by Lord Westbury on appeal from the M. R., 30 Beav. 40; Hare *v.* London and N. W. R. Co., 30 Law Journal Ch., 2 Johns. & Hemm. 80; Felder *v.* London, Brighton and South Coast R. R. Co., 1 Hemm. & Mumf. 489; Hallersley *v.* Earl of Shelburn, 31 Law J. Ch., and Robson *v.* Dodd's Law Reports, 8 Equity Cases, p. 301.)

II. That it was impossible to extend the principle on which a court of equity will, on proper occasions, enjoin a corporation at the suit of a single stockholder to a case like this. (Angell & Ames on Corporations, ed. of 1871, § 393; Dodge *v.* Wolsey, 18 Howard, 343; Moyley *v.* Alston, 1 Phillips, 790; Foss *v.* Harbottle, 2 Hare, 492; Lord *v.* Copperminers, 2 Phillips, 740; Baltimore and Ohio R. Co. *v.* City of Wheeling, 13 Grattan, 40.)

III. That the mere character of the relief sought (except so far as an injunction against carrying on "the independent express business," or engaging in the business of collecting checks, drafts, etc., was asked for), showed that in no event could a preliminary injunction be granted. (Audenried *v.* The R. R. Co., 18 P. F. Smith, 370; Hooper *v.* Brodrick, 11 Simons, 47; the Mocanaqua Coal Co. *v.* The Northern Central R. Co., 29 Leg. Int., p. 45; Rogers Locomotive and Machine Works *v.* Erie R. Co., 5 Green Ch. Reports; Sandford *v.* The Catawissa R. Co., 12 Harris, 378.)

IV. That the inconvenience that would result from granting

a preliminary injunction would be incalculably greater than that which would result from refusing it; and even if the plaintiff's right to relief on a final hearing appeared to be indisputable, the Court would refuse to interfere now.

V. That the act incorporating the railroad company gave them such liberties, franchises, and privileges "as were necessary or incident to the making and maintaining of the railroad and the conveyance of passengers and the transportation of the mail and of goods, merchandise, and commodities thereon. (Act of April 4, 1833, § 2, proviso; P. L., p. 146.)

That the act of April 3, 1862, P. L., p. 234, extended to the P. and R. R. Co. the privilege to "contract for the transportation of coal and other articles to and from points beyond their line, and to include the charge for such transportation in their charge for tolls."

(1) That the *right* of a railroad company to acquit itself of responsibility by unloading goods at their depot seems to have been stablished. (Shenk *v.* The Steam Propellor Co., 10 P. F. Smith, 109; Morris and Essex R. *v.* Ayers, 5 Dutcher, 393; Norway Plains Co. *v.* Boston and Maine R Co., 1 Gray, 263; Tanner *v.* Oil Creek R. Co., 3 P. F. Smith, 411; 2 Parsons on Contracts (5th ed., 1864, p. 189.)

(2) That under the English decisions the mere reception by a railroad company of goods destined and marked for a point beyond its line implied a contract to deliver at the destination. (Muschamp *v.* Lancaster and Boston R. Co., 8 M. & W. 421; Collins *v.* Bristol Ex. R. Co., 5 H. & N. 969; 7 House of Lords, 194; 2 Redfield on Railways (3d ed.) § 12, chap. 23, § 13, p. 109, 194; 1 Parsons on Contracts (3d ed.) 687; Jennison *v.* C. A. R. and T. Co., 4 Am. Law Reg. 234; Forsythe *v.* C. and A. R. Co., 11 P. F. Smith, 81; Penna. R. Co. *v.* Berry, 18 P. F. Smith, 272.) "In England and upon the continent it is the practice for the companies themselves to carry parcels by express, which is here done chiefly by others, under contract with the railroad companies." (2 Redfield, pp. 14, 15; S. W. R. C. *v.* Redmon, 10 C. B. (100 E. C. L.) 675.)

VI. That the defendants were common carriers, and as such

were subject to no other rules or regulations than any other common carriers, incorporated or not. That every person had the right to place cars on their road, and to furnish the motive power required for their transportation. (Boyle *v.* The P. and R. R. R. Co., 4 P. F. Smith, 310; Penna. R. R. Co. *v.* Sly, 15 P. F. Smith, 205.) That there is no rule of equality in regard to the charges of a common carrier. (Fitchburg R. R. Co. *v.* Gage et al., 12 Gray, 393; Baxendale *v.* The Eastern Counties R. R. Co., 4 C. B. (93 E. C. L. R.) 61; Branley *v.* The South Eastern R. R. Co., 12 C. B. 63 (104 E. C. L. R.).

The defendants argued in regard to the plaintiff Dinsmore, as follows:

I. That the plaintiff's case was not such as to entitle him to an injunction against the transgression of the defendants' charter, alleged to have been involved in their engaging in what was described as the "express business." That neither he nor the association he represented held a share of the defendants' stock, hence no breach of the *quasi* trust relation between a stockholder and the corporation could be averred. That there was not even a contract relation between the plaintiff and the defendants, and if there had been, such a relation would not of itself be a sufficient ground for the interference of a court of equity. That no right of property claimed by the plaintiff was invaded or imperiled; nor had the plaintiff established any right whatever which could be affected by the alleged usurpation of the defendants.

II. That a court of equity could not grant the relief sought by the prayers in the plaintiff's bill to compel the defendants to extend to the Adams Express Co. certain facilities for the transportation of their freight. That the legal right, the infringement of which could be enjoined in equity, must be existing, continuing, and affecting property. (Gee *v.* Pritchard, 2 Swanst. 414; The Emperor of Austria *v.* Day and Kossuth, 3 DeG., F. & J. 239; Kerr on Injunctions, p. 1; Sutton *v.* The S. E. R. Co., Law Rep. 1 Exch. 32; Pickford *v.* The Grand Junction R. R. Co., 3 Railway and Canal Cases, 538.)

That the chancery jurisdiction of the federal courts was the same in all the States, and the rule of decision was the same in all; its remedies were not regulated by the State practice. (Bayle *v.* Zacharie, 6 Peters, 648; Dodge *v.* Woolsey, 18 How. 347; Noonan *v.* Lee, 2 Bl. 500; Gordon *v.* Hobart, 2 Sumn. 401; Mayer *v.* Foulkrod, 4 W. C. R. 349; Dow *v.* Chamberlain, 5 McL. 281; 1 Brightly's Fed. Dig. 283.)

The English "Packed Parcel" Cases: Held: that the statute relating to the railroad company required the charges to be reasonable. (Pickford *v.* The Grand Junction R. R. Co., 10 M. & W. 399.)

Held: That the charges of a railroad should be equal and reasonable under the English act. (Parker *v.* Great Western Railroad Company, 7 M. & G. 253 (49 E. C. L. R.).)

Carriers were charged for packed parcels, the public were not. Held: a violation of equality clause in statute relating to the R. R. Co. (Parker *v.* The Great Western Railroad Co., 11 C. B. 545 (73 E. C. L. R.); Edwards *v.* Id., ib. p. 558.)

The following cases are to the same point as the above. (Crouch *v.* The London and N. W. R. R. Co., 14 C. B. 78 (78 E. C. L. R. 254); Crouch *v.* The Great Northern Railway Co., 9 Exch. 556 (W. H. & G.); Crouch *v.* The Great Northern Railway Co., 11 Exch. (Hurlst. & Gord.) 740, *p. 742.)

Held: That an action may be maintained by an express carrier's customer, in his own name, against a railway company for the loss of, or injury to, a carrier's packages. (New Jersey Steam Navigation Co. *v.* The Merchants' Bank, 6 Howard, 344; Angell & Ames on Carriers, 4th ed., §§ 98, 466, 494; 2 Redfield on Railways, 3d ed., pp. 13, 17.)

Held: That there was no rule of equality at common law. (Braxendale *v.* The Eastern Counties Railway Co., 4 C. B. (N. S.) (93 E. C. L. R. 63).

Held: That a railway company was justified in charging a carrier a separate rate on each separate parcel addressed to different ultimate consignees, although the parcels were deliverd to the carrier's agent and were marked with the carrier's address. (Garton *v.* The Bristol and Exeter Railway Co., 1 Best & Smith 112 (101 E. C. L. R.).

Held: That double charge for parcels packed together was unequal and unreasonable under the statute. (Piddington *v.* The Southeast Railway Co., 5 C. B. 109 (94 E. C. L. R.).

Held: That neither the statute nor the common law required equality of charges. (Branley *v.* Southeast Railway Co., 12 Com. Bench (N. S.), (104 E. C. L.) 63.)

Held: That the railway company must charge equal rates. (Great Western Railway Co. *v.* Sutton, 3 H. & C. 80 (Exch. Ch.); in Law Reports, 4 English and Irish Appeals, 226; Parker *v.* Great Western Railway Co., 6 Ellis & Blackburn (88 E. C. L. R. 16).

Held: That a railway company cannot give undue preference to themselves *in their separate capacity as carriers, other than on their line of railway.* (In re Baxendale and the Great Western Railway Co., 5 C. B. (N. S.), (94 E. C. L. R.) 336.)

Held: That to constitute "an undue or unreasonable preference" within the act, by reason of an inequality of charge, it must be for traveling over the *same* line or the *same portion* of the line. (Caterham *v.* The London, Brighton, and South Coast Railway Co., 1 C. B. (N. S.) 410 (87 E. C. L. R.).

Held: That an omnibus proprietor who carries passengers and their baggage for hire to and from a railway station, cannot maintain an action against the company for refusing to allow him to drive his vehicle into the station-yard. (Barker *v.* The Midland Railway Co., 18 C. B. (86 E. C. L. R. 45).

Held: That the granting of an exclusive privilege to one omnibus proprietor to enter the station-yard, was a breach of the statutory prohibition against the granting of undue and unreasonable preferences. (In re Marriott, 1 C. B. (N. S.), (87 E. C. L. R. 499). The contrary was held, on the ground of "no inconvenience to *the public*" having been shown. (In re Beadell, 2 C. B. (N. S.), (89 E. C. L. R. 509); In re Painter, 2 C. B. (N. S.), (89 E. C. L. R. 701).

Other illustrations relating to the exclusion of goods-vans after a certain hour of the day, are found in Garden *v.* The Bristol and Exeter Railway Co., 6 C. B. (N. S.) 639 (E. C. L. R. vol. 95); and Baxendale *v.* The Southwestern Railway Co.,

12 C. B. (N. S.) 758 (E. C. L. R. vol. 104); In re Palmer *v.* The London and Southwestern Railway Co., Law Reports Common Pleas, 588. In reference to charging for cartage, see Garton *v.* The Bristol and Exeter Railway Co., 6 C. B. (N. S.). (95 E. C. L. R.) 638; Baxendale *v.* The Great Western Railway Co., 14 C. B. (N. S.) 1 (108 E. C. L. R.); Baxendale *v.* The London and Southwestern Railway Co., Law Report, 1 Exchequer, 137; Cumberland Valley R. R. Co.'s Appeal, 12 P. F. Smith, 218; Boyle *v.* The P. and R. R. R. Co., 4 P. F. Smith, 310.

The following opinions were delivered April 25, 1873:—

McKennan, Circuit J.—The prayers of these bills are the same. Although, in form, they invoke the preventive intervention of the Court, they are founded upon the alleged denial of certain legal rights claimed by the Adams Express Company, and it is manifest that the only beneficial measure of relief would be a mandatory order, constraining the defendant to concede to the express company the exercise and enjoyment of the rights claimed by it. This it may be within the range of the power of the Court to decree, but it ought to be done only under circumstances of special exigency, to avert the continuing injuriousness of clearly wrongful acts. As a method of enforcing the concession of a mere right, it is inconsistent with the object and appropriate functions of a preliminary injunction.

In The Lehigh Coal and Navigation Co. *v.* The Lehigh Valley R. R. Co., referred to in Audenried *v.* The Philadelphia and Reading R. R. Co., 18 P. F. Smith, 376, Mr. Justice Strong said: "A preliminary injunction ought never to be granted except in a clear case, and then only to prevent a substantial injury. Its purpose is to keep things in their existing condition until the case can be finally heard. As it is the strong arm of the law, it must be used only when necessity requires it. And a preliminary injunction can never be necessary when the thing sought to be restrained has been already done; for its province is not to undo, but to prevent and preserve." And in Farmers' R. R. Co. *v.* Reno, Oil Creek and Pithole R. R. Co., 3 P. F. Smith, 224, the same learned judge said: "The sole

object of such an order is to preserve the subject of the controversy in the condition in which it is when the order is made. It cannot be used to take property out of the possession of one party and put it into the possession of the other. That can be accomplished only by a final decree."

It is true the allowance of mandatory interlocutory injunctions has, to some extent, the sanction of the modern English practice. It has grown up upon the supposed authority of Lord Eldon, who made such an order, for the first time, in Lane *v.* Newdigate, 10 Ves. 193. But he evidently regarded it as exceptional, and while he considered the injury complained of as a clear invasion of the complainant's rights, demanding prompt reparation, he declined to decree a specific correction of it by the defendant, but so avowedly framed his order as to "create the necessity" for the defendant doing what he was unwilling to order him directly to do. Such a case cannot be regarded as evidence of the existence of a uniform practice, or as a warrant for the establishment of one. It has certainly not led to such a result in this country, for in Audenried *v.* Philadelphia and Reading R. R. Co., *supra*, Mr. Justice Sharswood says, with great force: "There are some few instances in England in which a mandatory order has been made in an interlocutory application, but they have been extreme cases, and ought not to be followed as precedents."

Is there anything, then, in the circumstances of the present cases to demand a resort to so questionable a mode of interposition?

The Adams Express Company is entitled to protection only against such illegal acts of the defendant as are prejudicial to its rights and interests. If the railroad company has assumed the exercise of any franchise not conferred by its charter, the express company is not authorized to call it to account. If, without right, it seeks to appropriate the profits of a business of which the express company before had the monopoly, it does not thereby incur any liability to the express company. Their relations to each other grew out of the corporate duties of the defendant as a common carrier, and it is only for a

failure or refusal to perform any of these duties to the express company as a shipper that the latter has a right to complain.

The transportation of its freight over the defendant's road is not denied to the express company, nor can it be. The parties disagree as to the regulations imposed and the rates demanded by the defendant. The right to a rebate from the charges of the defendant, equal to the cost of collecting, transporting, and delivering parcels from and to the doors of the consignors and consignees, and the right to pay for transporting a package of parcels only the price charged for a separate one, are claimed by the plaintiff, and constitute the substantial subjects of the contention. Practically, only the profits to be derived from the express business on the Philadelphia and Reading Railroad are involved in it. Shall these profits accrue to the railroad company or to the express company?

Are these questions of such urgent significance as to call for their decision before a final hearing? To decide them now, as must necessarily be done if the present motion is allowed, is, in effect, to decide them finally, because a final decree could not more fully secure to the plaintiff the enjoyment of what it claims than would an interlocutory injunction. Why should this be done in the absence of an answer and of the proofs necessary to a precise adjustment of the relative rights and duties of the parties, or without a trial at law? "To preserve the subject of the controversy in the condition in which it is" now, does not require it, but the effect would be to undo what has been done, to take away from the defendants the controverted rights now enjoyed by them and confer them upon the plaintiff. This can be accomplished appropriately only by a final decree.

Nor has the complainant Camblos any better title to this summary relief than the express company. As a stockholder in the corporation defendant, his only interest is in being protected against the risk of loss. So long as those who manage the corporation keep within the limits of its charter, and commit, or propose to commit, no breach of their trust, he has no right to complain. In Dodge v. Woolsey, 18 How. 341, the

Court says: "It is now no longer doubted, either in England or the United States, that courts of equity in both have jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction to restrain those who administer them from doing acts which would amount to a violation of charter, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchise if the acts intended to be done create what is, in the law, denominated a breach of trust." If the acts complained of are violations of the defendant's charter, as they are not because concerning only the administration of its legal faculties, the mischief has been already done, and a preliminary injunction could not avert their injurious consequences; and surely the value of the complainant's stock will not be impaired, or the dividends upon it lessened by securing its participation in the profits of a business which he seeks to divert into another channel. And then as to the apprehended liability of the defendants to the express company for damages, he was voluntarily sought the risk from which he asks to be protected. It is charged and not denied that he acquired his stock "on account and in the interest of the Adams Express Company, and solely with the view of giving himself a supposed status in court, to enable him to maintain the present suit ostensibly as a stockholder of the Philadelphia and Reading Railroad Company, but really as an agent of the Adams Express Company," and "that the expenses of the said suit are to be borne by the said company." And these averments are corroborated by the fact that his bill is filed at the same time with and is an exact counterpart of the express company's bill. He does not, therefore, come into court with a *bona fide* complaint as a stockholder really seeking protection, but as the auxiliary of another party whose proceedings is adverse to his interest as a stockholder. It is not a question of his motives, but of the genuineness of the character in which he presents himself, and of the good faith of his appeal for summary relief. A court

of equity is not the redresser of stimulated wrongs, nor will it exert its strong arm to relieve a complainant in a position which he has voluntarily assumed, with a full knowledge of its perils.

The motion for a preliminary injunction is, therefore, denied.

CADWALADER, J.

I concur in the opinion of the circuit judge, and in his reasons. We have arrived at the same conclusion by processes of reasoning perfectly consistent, though not alike. His opinion, as delivered, is, almost independently of any question upon the merits, confined to that of remedy in the present stage of the cause. My opinion was formed upon a consideration of the merits of the whole controversy, reducing the numerous questions to two, and even dividing each of them, so as to leave only one point under each, open to future doubt.

I was thus able to limit the question, which the circuit judge has considered at large, to these two points. But it was therefore necessary to form an opinion upon most of the other questions. This was done without any opportunity of consultation with him, until the present term. Either method of considering the case was proper. It had been very fully argued, and nothing could be added to the printed briefs of counsel. But if the circuit judge had either differed, or doubted, as to any part of my opinion, I would not have delivered it. He, however, concurs on every point; and is desirous that it should be considered as the opinion of both judges.

The case at the suit of the Express Company will be properly considered before any distinct consideration of the stockholders' bill. But certain points of argument which are more or less common to the two cases will, in considering the former one, be noticed somewhat more fully than might be necessary if it were alone before the court. Any question of supposed liability of the charter of the defendants to forfeiture, belongs only to the case under the stockholders' bill, as the circuit judge has clearly shown. But the interpretation and effect of

the charter, upon which such a question depends, may also ascertain relations of the defendants either to the public generally, or to certain freighters, upon questions belonging peculiarly to the other case.

Each party imputes, with apparent reason, to the opposing litigant, a purpose to monopolize the transportation by horse-power, of light freights of small bulk to and from the railroad of the defendants. With permission of the circuit judge, I quote him as having, in consultation, said of the case, that it is a war of monopolists.

There is unlimited legislative power to create such a monopoly. (6 Wharton, 46; 12 Harris, 382; 1 Wallace, 145-6; 3 Wallace, 81, 213; Slaughter House Company's Case, Supreme Court of the United States, 14th of April, 1873, affirming 22 Louis; An. 546; and see 2 Gray, 1.) Any exclusive profit granted by the State, either to an individual, or to a corporation, is a monopoly in the general sense of the word.

In former times it was ordinarly understood as an exclusive profit for which the public received no equivalent benefit. Such a monopoly, though against public policy, and odious, can be legislatively granted in most States of the Union. But in our day, a wiser policy and a decent regard for public interests, and for public opinion, prevent any direct and avowed establishment of monopolies of this kind.

Existing railroads are not monopolies in any such sense. The efficiency of the locomotive steam engine for enlarged purposes of transportation upon a fixed metallic rail, was not completely established until the latter part of 1829. The public benefit then expected from a railroad was the substitution of the power of steam for that of horses, in transportation upon land between distant places.

It was known that the production of this result would require immense expenditures. But the capital invested in the construction of railroads, and in their equipment, exceeded by almost countless millions, what was at first expected. Nevertheless, wherever the roads have been completed, even where the private contributors have received no remuneration for

their outlay, the public benefit has been great; and where the private remuneration has been greatest, it is but small in proportion to the beneficial results to the public attained, and in prospect. These results exceed immeasurably the most sanguine former hopes. In all directions, a force equal to that of millions of the strongest horses, working by night and by day, and consuming no food, has, on both sides of the Atlantic, been made available for quick transportation. The consequent increase of wealth at the ends of the lines was, in part, predicted. But the almost unforeseen production which railroads generate along their borders will soon exceed, where it may not already surpass, or equal, that upon the shores of great navigable rivers.

The ordinary modern practical use of the word monopoly is in the sense of an exclusive profit for the grant of which by the State the public are intended to receive equivalent benefit. In what follows, the word, unless otherwise qualified or explained, will be so understood. It has been said that every grant of a corporate franchise or privilege may, so far as it extends, be called a monopoly. The word will not, however, be used in so vague a sense. It will be understood as applicable to those privileges only with which there is no present available competition.

The legislative charters of some of the railroad companies created soon after 1829 contained express provisions of different kinds against the making, during a limited period, of a railroad by any one else within a defined area. The Legislature could not afterwards, with constitutional effect, sanction the establishment of such a competing road without providing for the payment of compensation for the loss or diminution of the monopoly, after a proper ascertainment of the amount. (6 How. 507; 13 How. 82, 83; 11 Wright, 325-329; 2 Gray, 1, 42; 3 Wallace, 52; Redfield, § 70, 4th ed., vol. 1, pp. 257-8.) It is believed that in Pennsylvania and in most of the States no such improvident legislation is now in force. Where it is not, the Legislature, not having disabled itself, is under no such constitutional restraint; but may

authorize the unconditional construction of new railroads, however near they may be to existing lines. The justice and wisdom of such legislation depend upon relative considerations, which may vary as increase of wealth and population diminish the area of a reasonable monopoly. The question may likewise be affected more or less by lapse of time. To authorize the construction of a new railroad very near to a rail recently laid might be manifestly unjust and impolitic. (7 Harris, 216, 217.) But when a change of local circumstances creates a public want of a neighboring line which can be profitably used, it would be anomalous that the existence of the former public highway should indefinitely prevent the construction of the new one. The loss, total or partial, of the profits of the former one from consequences of such local change was a contingency to which its owners were always liable. We see this contingency on a large scale in existing and projected railways to the Pacific. The unlimited legislative power over the subject is unquestionable. The construction of a new road without any compensation to the owners of the former one, may be constitutionally authorized with no legislative motive except the encouragement of competition. (11 Pet. 544; 23 How. 437; 3 Wallace, 213; Redfield, § 231, 4th ed., vol. 2, p. 408. See 12 C. B. N. S. 58-63, and Mr. Dickson's note.) But, though routes the most proper for competition were legislatively established, effective competition might be long postponed through the facilities which connections by intervening railroads afford for conventional arrangements between companies intended to have been competitors, and for consolidations, mergers, and so-called amalgamations of companies, and also for purchases or leases of a company's road and franchises by another company, etc. (See 9 Casey, 281-288; 5 Wright, 447; 3 P. F. Sm. 9, 19, 20, 59; also Shelford, Glen's ed., Intr. xlviii, xlix.) As yet, few, if any, truly competing lines exist. Even between Philadelphia and New York the routes are still so controlled as to preclude competition. The question of monopoly, therefore, continues to be all-important. There is, or was

lately, from Paris to Bordeaux, but one railroad. The road itself is, therefore, in France, considered in some sort a monopoly. (Duverdy Contr. de Transpor. §§ 162, 159, pp. 239, 236, and Intr., p. 10.) So the defendants have now the only existing railroad from Philadelphia to Pottsville, and the only connection by rail with many other great routes. The business of the road must, therefore, necessarily be, in some respects, monopolized by the defendants now; and whatever may be the future effect of possible competition, it cannot wholly deprive them of certain exclusive profits. (See 1 Q. B. 584; 4 Q. B. 36, 37.)

The company, as owner of the road, has thus a legitimate monopoly of the rates chargeable for the use by others of the track itself as a public highway. These rates and nothing else are, in a strictly proper sense, called tolls. (4 P. F. Sm. 315; 15 P. F. Sm. 210; 1 Q. B. 575-577; 9 Exch. 642.) If railroad companies did not furnish any motive power, and were not in any wise carriers, their only gross profits would be tolls thus properly defined, and the companies would have a monopoly of them.

The earlier legislative charters of railroad companies after 1829 were not alike. Some of them indicate that the companies were not expected to engage at all in the business of transportation. But most of the charters, even of that period, import that the respective companies were expected to become carriers on their own roads, though not to monopolize the business. The Supreme Court of Pennsylvania have called the former simply railroad companies, and the latter both *railroad* and *transportation* companies. The latter, as railroad companies, have "power to construct and maintain" the roads, "and to charge and receive tolls from those" who may "transport either merchandise or passengers over" them; and, as transportation companies, have authority "to transport either passengers or the property of others over their own roads, in their own cars, and with their own motive power." (4 P. F. Sm. 312; see 12 P. F. Sm. 228, 229.)

The same court has, in construing the charter of the de-

fendants, decided that they are, by necessary implication, if not through express enactment, a transportation company, as well as a railroad company; in other words, have the twofold franchise of taking tolls and also engaging in the business of carriers upon their own road. (Ibid.) Thus the charter, though its effect is to give a monopoly of tolls, confers no monopoly of the business of carriers. Yet the defendants have a *practical* monopoly of the business of carriers *upon their own rails*. This will require explanation.

Until 1829 horse-power alone had been used upon railroads. An English railway, or tram-road, had been made by laying iron or wooden pieces in two parallel lines for the wheels, without levelling the track by cuttings or embankments more than by the grading of a turnpike road. Most of these former railways or tram-roads were private ways. But some of them were public highways. (See 2 B. & Ald. 646; Shelford, Glen's Ed., Intr. pp. xxvii, xxviii.) From a supposed analogy to them, the original notion as to a railroad, fitted for the use of a locomotive steam engine, was than any one of the public might, under proper conditions and regulations, use his own locomotive engine with its train upon the fixed rail, in like manner as a boat upon a canal, or a vehicle upon a turnpike, paying in like manner a fixed or a reasonable toll. The Versailles Railroad, on the left bank of the Seine, seems to have been thus used, for a time, to a limited extent (Duverdy, § 160, note, p. 237); and in England the Grand Junction Railway was, at one time, and possibly may still be, to a small extent, so used. (See 4 Q. B. 20; Shelford, Glen's ed., vol. 1, p. 507.) The rail may still be thus used by the engines and trains of connecting railroads paying toll or an equivalent compensation. (See 4 Q. B. 19, 20, 21, 22, 37, 38; 9 Exch. 642; Law Rep., 2 Q. B. 251.) But except for purposes of connecting railways, this use of the track by others than the company owning the road is very little if at all practiced in Europe, and is in the United States almost if not quite unknown. (Redfield, § 124, 4th ed., vol. 1, p. 446.)

This tacit exclusion of the public from participating in the

business of transportation by rail resulted from what was almost absolute necessity. Under the present system of transportation upon a railroad, such are the dangers from the moving fires, from the intensity of the pressure of steam, and the frequent insecurity of boilers, from the great velocity of the trains, their extended length and immense weight, and the inability to deviate from the track, that a divided control of the locomotive power was very soon found inadmissible. It thus became impossible for the public generally to use locomotive engines upon the lines, and impossible to use cars of any kind independently of the most rigid supervision and regulation by the railroad companies. (See Shelford, Glen's ed., vol. 1, Intr. pp. xxix, xxx.) If dangerous interference with the police of the roads could have been avoided, the subjection was greater than could be submitted to by independent carriers. Through this relative necessity, the business of carriers by rail was everywhere monopolized by railroad companies.

The origin of the enlarged monopoly was thus explained in a very instructive argument in 1842, by Mr. Martin, afterwards a Baron of the Exchequer. (10 M. & W. 412, 413.) It had before been, and was afterwards, judicially so explained by Lord Denman. (1 Q. B. 558, 580; 4 Q. B. 18.) The companies were indirectly fortified in the monopoly through their exclusive or preferential use of their depots or stations, and their warehouses, platforms, etc., and the immediate approaches or outlets. The appropriation of some of these preferential facilities to their own exclusive benefit has not been judicially considered wrongful. Whether it may not be such as to encroach in some degree on rights of the public, is a question which there is no occasion to consider now, because the companies would, independently of such advantages, have a practical present monopoly of the business of carriers upon the rails. Lord Denman said that "the supposition of a free competition of carriers on the same railway is practically little less than absurd," and that "if all difficulties were removed, as to the stations, warehouses,

landing places and approaches, and all these were supposed as much laid open to the public as the railway itself, the very nature of the mode of conveyance forbids a free competition of rival carriers." (1 Q. B. 579.) "It would," he added, "be no answer to say that, by law, the railway is a highway, that all the world may carry goods and passengers on it, that it is an accident that the company alone monopolize all the trade, and that their monopoly may cease to-morrow." (1 Q. B. p. 584; see also 5 C. B. N. S. 351.)

A recent observation of the Supreme Court of Illinois, that a railroad company is chartered solely for the purpose of exercising the functions and performing the duties of a common carrier (February 22, 1873, Chicago & Alton Railroad Company *v.* R. R., etc., Comrs., Chicago Leg. News, March 1, 1873, vol. 5, pp. 266, 267; Phil. Leg. Gaz. March 14, 1873), is thus, to practical intents, true.

If tolls, distinctively so called, were alone in question, and if the rates of toll were neither prescribed nor limited by the Legislature, the companies could not charge unreasonable rates. But this proposition is practically merged in the question of the charges which the companies may make as common carriers.

The general railroad law of Pennsylvania gives to the respective companies to which it applies exclusive control of the motive power; and enables them to include in a single charge both tolls and a compensation for the use of the motive power when the cars to be transported are owned or furnished by others. This enactment does not, where the company themselves are carriers, regulate the charge of the freight money. (Act 19th of February, 1849, § 18.)

This general law does not apply to the present defendants. With reference to their charter, the Supreme Court of the State has discriminated further, distinguishing tolls defined strictly from charges for use of the locomotive power, and distinguishing both of those charges from charges of passenger money and of freight money. (4 P. F. Sm. 314, 315; 15 P. F. Sm. 210; 12 P. F. Sm. 228, 229.)

Every charge by a railroad company, *as a carrier*, upon the *line of the road itself*, is thus composed of three values. One of them is the amount which would be chargeable simply as toll, if the company neither furnished motive power nor were carriers. Another is the additional charge which they might make for the use of the motive power if they were not carriers. The other may be distinctively called freight money. It is the additional amount which is chargeable because they are the carriers. These three values may be reducible to two by including the charge for use of the motive power under the head of toll. The two values will then be those of toll and freight-money. American, French, and English legislation contains careful provisions for analyzing the sum charged in tariffs, or in reports made annually, under these two heads, though not under precisely these names. The statistics of the analysis, of which the memorials are thus preserved, may be useful, not only in defining present relations between the companies and the public, but also in the contingency of such future improvement in the method of transportation as may open it to the public.

In external relations of the companies a single charge alone occurs. (See 1 Q. B. 575, 576.) It has, perhaps, oftener been called a toll than by any other name. The designation, as we have seen, is not precisely accurate. But it would seem at first view to be of little or no importance whether the charge were called a toll, and was understood as including the value of freight-money, or were called freight-money, or *fare*, and was understood as including the toll. The verbal distinction has consequently been disregarded more or less everywhere, and occasionally even in Pennsylvania, where it has been best explained. In England, confusion and uncertainty have arisen from a lax use of the word tolls, in both legislative and judicial phraseology. It is to be regretted that the courts have not confined their application of the word tolls to charges for simple passage over the road. But, as we have already seen, such tolls are not now, in practice, chargeable except for the reciprocal use of connecting rail-

roads; and even as to them, a conventional commutation is probably made wherever it is authorized by the respective charters.

The objection to extending the application of the word toll with undue latitude is, that it tends to exaggerate the mental conception of a railroad company's monopoly. Of tolls, properly so called, the monopoly is an essential right of the company as proprietor of the road. The monopoly of the carrying business originates, on the contrary, in the relative necessity which has been described. In the former monopoly, the proprietary right is moral as well as legal. In the latter monopoly, there is neither proprietary nor essential moral right; and the legal right is co-extensive only with the necessity in which it originates. The extension of the claim of moral right beyond its just limit in this respect may have been the cause of otherwise inexplicable renewals of contestations by English railroad companies on points already litigated and judicially decided against them, and of the frequent new phases of the argument of old questions.

It may be suggested that this reasoning is too analytical, that the service of a railroad company as carrier is a single one, that the pecuniary consideration for it includes inseparably the profit in which the monopoly is rightful, and that it cannot be less rightful merely because an admitted necessity enlarges the service performed, and proportionally enlarges the pecuniary consideration.

The suggestions might, perhaps, prevail if transportation upon the line of rails were alone in question. But the present controversy concerns accessorial carriage by horse-power off the line of the railroad. Conceding the rightfulness of such accesssorial business beyond the rails, there can be no reason that it should be monopolized. It is conducted where tolls cannot be taken, and where steam-power is not used. (See 5 C. B. N. S. 362, 363, 355, 669, 679.)

In England, Chief Justice Erle stood almost alone in the opinion that a railroad company, in recompense for their outlay and of the fulfilment of the purpose of their incorporation,

had both a legal and a moral right of monopolizing, not only the carriage of goods upon the line of the road itself, but also the accessorial carriage performable off the line with horse-power. To this opinion, though always a dissenting one, he adhered with tenacity from 1861 to 1869. He had expressed it at nisi prius in 1854, when a verdict conformable to it, found under his direction, was set aside. (9 Exch. 559; see 11 Exch. 742.) It was opposed to prior decisions; but his dissent from them caused, in subsequent cases, a revision of the subject in the Exchequer Chamber and in the House of Lords, in which tribunals the prior decisions could not prevent the consideration of the question upon original grounds. On the fullest consideration his opinion was definitively rejected. (16 C. B. N. S. 137, affirming 14 C. B. N. S. 1, and acc. with 5 C. B. N. S. 336; Law Rep. 4 H. L. 226, affirming 3 H. & C. 800.)

Here, however, the complainants object earnestly, not only to the monopoly of such accessorial business by the defendants, but even to their engaging or participating in the business at all.

The consideration of this objection may be prefaced by another inquiry, which has been suggested in the argument. It is whether the defendants can, as carriers by rail, transport goods which are destined beyond the termination of their own road. This inquiry is not whether the responsibility of such carriers by rail continues until the goods reach the ulterior destination. It is not an inquiry what engagements may be made, or implied, as to putting the goods in the due course of transmission to such destination. The inquiry is whether such carriers must refuse to transport goods on their own route merely because they are to be carried farther, and whether they may not, on the contrary, solicit such custom in order to increase the profitableness of their business.

From time immemorial, the service of a common carrier to the public has included the transportation of matter destined beyond his route, and has included the affording of necessary

and proper facilities for the ulterior transmission. Great public inconvenience would result if railroad companies could not afford such facilities in this respect as other carriers. The act of Congress of 15th of June, 1866, purports to authorize every railroad company in the United States whose road is operated by steam to carry, upon and over the road, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination. This act provides that it shall not be construed to authorize any railroad company to make any new road, or connection with any other road, without authority from the State in which such railroad or connection may be proposed. The Pennsylvania statutes prior to 1866, which were fully reviewed in the cases reported in 3 P. F. Sm. 10, 20, and 62, and the subsequent acts of the 4th of April, 1868; 17th of February, 1870, and 26th of April, 1870, have established an extended system of direct and indirect connection of railroads within and without the State, and authorized their merger, consolidation, and lease for the further extension of continuous routes. Whether these laws apply directly to the question or not, their purposes would be materially frustrated if the companies could not take freights with unlimited ulterior destinations. But in the absence of such legislation (and without any special reference to the enactment of 3d of April, 1862, which, read in connection with an act of 5th of April, 1859, authorizes the defendants to contract for transporting freights to and from points beyond their line), the question would be attended with no difficulty. It has been judicially conceded, assumed, or decided, in Pennsylvania, in many of the other States, and in England, that a railroad company may, as a carrier, receive goods which are to be transported beyond the end of the company's own route, whether the destination is within or without the State or country, or is beyond seas. (6 Harris, 224; 9 Wright, 208; 10 Wright, 211; 11 Wright, 338; 4 P. F. Sm. 77, 83; 18 P. F. Sm. 277; 11 P. F. Sm. 85;

7 H. L. 194; 12 C. B. N. S. 63; 10 C. B. N. S. 675; 2 H. & N. 709; Law Rep. 1 C. P. 336; Law Rep. 1 Exch. 147, 148; 8 M. & W. 427; Redfield, §§ 180, 181, 4th ed., vol. 2, pp. 112, 123.)

This question has been considered more fully than would otherwise have been thought necessary in consequence of a remark of Chief Justice Redfield, upon a case in Connecticut (22 Conn. 502), that, if the matter were altogether new, there might be some doubt. (Redfield, *ubi supra.*)

The question, if it can be called one, having been disposed of, we may consider the objection that the defendants cannot, as carriers, use horse-power for accessorial business performed off the rails in collecting freights at the doors of consignors and in making deliveries at the doors of consignees. We have seen that the defendants cannot monopolize the business. Whether they can participate in it is the very different present question.

The question is not novel except in the physical proportions of the subjects of it. The scale of all the business of a railroad company is thus enlarged. The passenger car in the United States, if not in Europe, is the improved and enlarged substitute for the stage coach or diligence of other days. In the freight trains whose burden car is the substitute for the former great waggon, loads are now measured by the ton. The drayage and slow cartage to and from the rails are facilitated by turn-outs on rails, and by lateral railways. There is, perhaps, no proportional change greater than that in the measure of such light freights of small bulk as are conveniently transportable with speed, and are usually carried in the passenger trains. In the United States, these freights were formerly and are still called express matter. Although the demand for the labor of horses in Europe and in America continually increases, their aggregate strength is now less than sufficient for those purposes, incidental or auxiliary to transportation, for which the strength of men formerly sufficed. Portable articles were formerly understood as those which could be conveniently carried by hand, or, at

most, in a push-cart or wheelbarrow. Of their increase in bulk, we may form some estimate from the former contract of 1866 between the present litigants allotting whole cars, and fractional parts of cars, for such matter, and allowing seven cubic feet for the capacity of a strong box or safe. Of the increase in weight, an estimate may be conceived from English statutes allowing additional proportionate amounts of charge for the transportation of light matter of different kinds, describing it as of the respective weights of 100 pounds and 500 pounds. Independently of such enlargement in bulk and weight, the number of parcels or articles of this kind so accumulates for transportation by rail that they could not be collected and carried to railway depots and stations, or properly carried from them for individual delivery, without the use of suitable vehicles drawn by horses. These vehicles, comparatively light with certain relations, are with others comparatively heavy. They are not less necessarily incidental and auxiliary to the transportation of express matter by rail than the wheelbarrow, with its porter, was formerly the incident or auxiliary of transportation by waggon or stage coach. (See 5 D. & E. 396, 397.)

For the transportation by rail of express matter, and its incidental collection and delivery, economical and profitable arrangements have not been as yet systematized. The reason appears to be that the profits from the carriage of such matter on the rails are very small as compared with those of the accessorial business in which horse-power is used. An allegation of the complainant's bill, supported by an affidavit, is that this accessorial business, which they have heretofore conducted, is "enormously valuable." But from the statistics in reports of railroad companies to their stockholders, their own profits, under this head, seem to bear a very small proportion to those derived from carrying heavy freights.

There is no allegation that the charges to the public of those heretofore engaged in the express business have been unreasonable.

As the railroad companies cannot themselves monopolize

this accessorial business, it would be prejudicial to the public interest that they should be excluded from participating in it. Their participation may be the only means of preventing outside combinations to maintain high charges. If direct participation were impossible, the inducements to encourage outside monopolies would be dangerous to the public interest. Of this and analogous dangers, many examples on both sides of the Atlantic are found in books of reports. But the number of such examples may be small in proportion to that of cases unknown.

The first argument in support of the objection is that the legislative charters of railroad companies are construed strictly against the companies, and that their franchise of common carriers on the line of a railroad therefore cannot be extended by implication so as to include any transportation which is not upon the rails.

The charters of railroad and other public improvement companies are judicially designated as contracts between the respective companies and the State or the public. The expression contract, or bargain, after having been thus applied by Lords Ellenborough, Eldon, and Tenterden, and by other eminent judges of England, was judicially criticised there, because it might, unless explained, be understood as importing that the charters were executory contracts of the companies enforceable by mandamus. These companies are under no compulsory obligation to begin the projected improvements, or to complete them if begun. (1 El. & Bl. 858, 874; Redfield, § 152, n. 4th ed., vol. 1, pp. 630, 632-635.) After their completion, moreover, the companies have an option to omit or defer, and to intermit and resume the exercise of corporate functions of certain kinds. Nevertheless the charters are properly called contracts. They are at first conditional or executory, and may afterwards become executed contracts. The English criticism admits this. (Compare 1 M. & K. 162 with 2 Younge & C. Exch. 618; and 1 El. & Bl. 868, 869.) But if it did not, it could have no effect in the United States, except, perhaps, to qualify the use of

the word contract, not inconsistently with its application originally intended. An executed contract has its obligatory effect. The observation is important, because the Constitution provides that no State shall pass any law impairing the obligation of contracts. This prohibition extends to all contracts executed or executory, whether between individuals or between a State and individuals. The Supreme Court, adopting the suggestion of Blackstone (Com. ii. 443) that an executed contract differs nothing from a grant, have considered a legislative grant a contract on the part of the State. (6 Cr. 136, 137.) All State laws incorporating private associations for public purposes are thus legislative grants, and as such are contracts. (4 Wheaton, 630-650; 8 Wheaton, 92; 4 Peters, 560; 1 Black, 436; 4 Wallace, 549, 550; 10 Wallace, 515; 8 Wallace, 436, 437; 1 Wallace, 145, 146; 3 Wallace, 73; 13 Wallace, 212-214, 218, 266-268.) Public interests may afterwards require legislative abrogation, resumption, alteration, or transfer of the corporate franchises. But, unless the original acts of incorporation have reserved the right of such repeal or change, it cannot without the consent of the respective companies be effected constitutionally, except through laws providing for the payment of pecuniary compensation after proper judicial ascertainment of the amount. (6 How. 507; 13 How. 82, 83; 16 How. 369; 11 Wright, 325, 329; 2 Gray, 1, 42, and other cases above cited; also, Redfield, § 70, 4th ed., vol. 1, pp. 257, 258.)

These are now constitutional truisms. Not less trite is the remark, that in England, where legislative omnipotence prevents corporate franchises from being thus irrevocable, yet however improvidently they may have been granted, moral considerations generally suffice to protect them against legislative encroachments without compensation. Therefore, on both sides of the Atlantic, there is like moral reason for a strict construction of such charters, though the legal reasons may be more obligatory in the United States.

The reasons of policy or justice ordinarily given for such a construction are that the administration of a franchise of great

public interest by a private person or private association is against common right, and that the charters are penned by or for the private persons to whom they are granted.

Chief Justice Redfield observes truly that there is no necessity that the public functions in question should be confined to aggregate corporations. He says that the same franchises and immunities might be conferred by the Legislature upon any private person, and that whoever was the grantee, whether a natural person or a corporation, the same rights, duties, and liabilities would result from the grant. (On Railroads, § 17, 4th ed., vol. 1, p. 52, note 4.) It may be added, however, that the franchises might exist without the immunities. The universal practice, Chief Justice Redfield says, confines the public functions to corporations aggregate. (Ibid.) It adds force to the reasons for a strict construction of the charters that they in effect exempt the members of these private associations from individual responsibility.

The rule of strict construction generally prevents the implication of any corporate privilege not expressly granted. The acts incorporating the Chesapeake & Delaware Canal Company furnish an example. They authorize the charge of certain tolls for commodities in vessels passing through the canal, and for empty vessels except such as return empty after payment of a certain toll. As no power is given to take toll from passengers, or from a vessel on account of passengers on board, a vessel with passengers can, *as to them*, navigate this canal free of toll. (9 How. 172.) So the Stourbridge Canal in England was formed upon two levels which were connected by locks. The proprietors of the canal were incorporated by an act authorizing them to take tolls for articles passing through any one or more of the locks. The English decision (2 Barn. & Ad. 792), that this gave no right to toll from those who navigated one of the levels, without passing through a lock, has been generally approved in the United States. (11 Peters, 544, and cases next below cited.)

The rule of strict construction applies likewise where the words used would otherwise admit of different meanings, one of which would abrogate, restrict, or abridge independent rights, profits, or facilities of the public. Where the words are thus ambiguous, the meaning most favorable to the interest of the public and most adverse to that of the company should be adopted, because the company, "in bargaining with the public," ought to take care to express distinctly what is intended. (See the books above cited and 11 East, 685; 23 How. 88; 2 M. & G. 164, 165; 1 Black. 380; 2 Jo. 320, 321; 7 Harris, 218; 3 Casey, 339, 351; 8 How. 581; 2 P. F. Sm. 516, 517; 9 Harris, 22; 4 Bingh. 452, 453; 1 Q. B. 588; 3 De G., F. & J. 361.) A peculiar case, often cited, by mistake, as a leading one under this head, was that of the Glamorganshire Canal Company. The canal obtained its principal supply of water from the river Taaffe. Mills and iron works employing a considerable part of the waters of that river, and entirely dependent upon them, had been established before the incorporation of the company. The act of incorporation reserved or appropriated to one of the proprietors, whose rights were afterwards acquired by Mr. Blakemore, the surplus water not required for the use of the canal. The act authorized the canal company to make all such works, etc., as they should think proper for completing, maintaining, improving, and using the canal and other works. The capital which the company were authorized to raise was £90,000; and it was provided that if their annual profit should exceed eight per cent. on that amount, the tolls were to be reduced. The company having proceeded to construct the canal and works, and having expended the £90,000, found that it would require a further sum to complete them, and to make a desired extension of the canal; whereupon a supplementary enactment authorized the extension and completion; and enabled the company to raise an additional £10,000 for these purposes, provided that everything should be finished within a prescribed time. This was done. Afterwards, and after the expiration of the time limited, the company im-

proved the canal, and increased the supply of water for it, by making a new steam engine, and a reservoir; and, at a subsequent period, made a further improvement by widening and deepening the canal. These improvements diminished the supply of water for Blakemore's mills and works. It was decided at law and in equity, and by the House of Lords, that the act of incorporation had been an apportionment of the water-power between the company and Blakemore, and therefore that after the canal was finally completed the company had no right to enlarge or alter it to his injury. (1 M. & K. 154, 162, 167, 170; 3 Y. & J. 60; 1 Cl. & F. 262; 1 M. & K. 171-176, 177, 178; 2 C. M. & R. 133.) In this case, Lord Eldon (1 M. & K. 162) made the remark which has been criticised as above. He made in the same case another observation which has also been criticised. It was that, if individuals come to the legislature, and apply for a canal or a railway act, and the legislature, on being satisfied that the railway or canal can be made at an expense of, say, £100,000. forms them into a company with power to raise money to that amount, the authority is given upon a representation by them, and in full confidence by the legislature, that such a sum will enable them to complete the work; and, if they find afterwards that £100,000 is not enough, the Court of Chancery, Lord Eldon thought, would find it very difficult to allow them to proceed with the work until they had obtained further legislative authority. (1 M. & K. 164.) This observation should not be understood with an unrestricted application. Upon the question of encroachment on Blakemore's water-power, the limit of the authorized amount of investment was a measure of the company's privilege; and Lord Eldon's observation applies wherever a like principle is in question. But an unqualified application of his words to other cases cannot be made. It might, in many cases, promote unwarrantable interference with the execution of authorities legislatively conferred. (See 3 M. & Cr. 422-426; Redfield, § 210, 4th ed., vol. 1, pp. 332, 334.)

It is contended on the part of the complainants that, as in

the cases of the Chesapeake & Delaware Canal, and the Stourbridge Canal, so here, the profit of the defendants cannot be derived from any business not within the direct and express provisions of their charter.

But the reasons for thus applying the rule of strict construction are insufficient. The present question is, *on this point*, neither that of monopoly in the defendants, nor that of abrogation, restriction, or abridgment of any rights which the public would otherwise have. A different or qualified, if not an opposite, rule of construction applies to questions of the capacity of the companies to improve the means and increase the facilities of transportation, or otherwise to enlarge the sources, or expand the development, of legitimate profits derivable from varied uses of the corporate franchises. Under the latter head, useful incidental or auxiliary corporate functions may be attributable by *necessary* or *fair* implication. (4 P. F. Sm. 316; 3 Casey, 351, 352.) Legislative charters of improvement companies may, as to such relations, even be construed liberally. (7 B. & C. 731.) We have already seen this exemplified in the transportation of goods having ulterior destinations.

Another example may be found in the charter of the same Glamorganshire Canal Company, which has already been mentioned as exemplifying, in another case, the application of the rule of strict construction. An account of the annual profits of that company was from time to time taken in a manner prescribed by the charter, in order to ascertain whether they amounted to eight per cent. of the capital, in which case the tolls were to be reduced, as has already been stated. It was twice decided by the Court of King's Bench that, in this account, the company were to be credited for their expenditures in making the same improvements already mentioned as causing encroachment on Blakemore's water-power. These were the steam engine, the reservoir, and the deepening and widening of the canal. The question thus arose between the company and the freighters on the canal, who were interested in obtaining the reduction of tolls; and,

in one of the cases, the promoter of the controversy was the same party, Blakemore, but in the different relation of a freighter. The credits were, in each case, allowed as the cost of improvements by the company, which were, in this relation, and with reference to public interests generally, authorized by the charter. In other words, the improvements were properly made as against all the world except Mr. Blakemore as the owner of his apportioned water-power. On the question of expense attending the supporting, maintaining, and conveniently using the navigation, the Court, in language already quoted, said that the words of the charter "ought to receive a liberal construction." (12 East. 157; 7 B. & C. 722, 731.) These decisions were approved in the cases decided, on the same legislative words, in favor of Blakemore as owner of the water-power. (1 M. & K. 170, 171; 2 C. M. & R. 142.) The rule of strict construction, therefore, does not apply without qualifications which are overlooked in the argument for the complainants.

Before stating another of the arguments in support of the complainant's objection, an observation of some importance in the case becomes necessary. It is that a railroad company having a capacity to act as a common carrier is not obliged to do so, even upon the line of its rails; and if it engages in the business at all, may do so generally, or only as to freights of certain kinds, light or heavy, small or large, or for only a part of the line of rails. (4 Exch. 373, 374; 7 Exch. 712; 6 H. & N. 654; Shelford, Glen's ed. II, 613, 614; Redfield, § 183, 4th ed., vol. 2, pp. 121, 132; and see 1 El. & Bl. 858.) So the company may have an option whether to engage or not in the accessorial or incidental carriage, off the rails, by horse-power, to and from the depots and stations, or the offices of reception and delivery, that is to say, from the doors of consignors, and to the doors of consignees. (See Law Rep. 6 C. P. 561, and other cases.) Now companies which have made no public profession or offer to engage in the accessorial business of collecting or delivering are not requirable to receive any freights except at their own stations, depots, or

offices of reception, or to make any delivery beyond them. (23 How. 39; 5 Wallace, 495; 6 Casey, 247; 10 P. F. Sm. 114, 115; 19 P. F. Sm. 377; 1 Rawle, 203; 10 M. & W. 420, 421; Law Rep. 3 Exch. 189; 4 D. & E. 581; 5 D. & E. 395, 397, 400; 8 Taunton, 443; 3 Mann. & Gr. 687-690; M. S. cited, 15 Vin. 348, pl. 25; 10 Metc. 472; 1 Gray, 263; 16 Gray, 134; Redfield, § 175, 4th ed., vol. 2, pp. 60-64.) But a company which does engage in such accessorial business must, in like manner as other carriers by land, make deliveries at the doors of all consignees who do not dispense with such delivery.

The argument for the complainants, which may now be stated, is a mere assumption that, because a company which has not made any such engagement to the public is excused from delivering beyond the precinct of the railway, therefore such an engagement cannot be warranted by the company's charter. The assumption is of the very point or proposition which was to be demonstrated.

In most of the cases heretofore cited as denying to the defendants a monopoly of this accessorial business, and in most or all of the cases hereafter mentioned upon questions of the defendants' charges for the accessorial service, the lawfulness of their participating in such business was impliedly, if not expressly, recognized.

The objection seems, therefore, to have no support of reason or authority.

But a railroad company, so far as it actually or professedly engages, either generally or specially, in the business of a common carrier, is under at least the same obligations to the public as an individual common carrier upon a route of any other kind. (12 Wallace, 270.) To the extent of the means of convenient transportation, which are in the course of a common carrier's business available, he cannot refuse to receive goods for transportation which are seasonably offered; and he is bound to serve all persons impartially.* A

* See The Peoria and Rock Island R. R. Co. *v.* The Coal Valley Mining

railroad company, as it cannot encounter competition upon the rails, may have consequent inseparable advantages in conducting the accessorial business with horse-power. This gives peculiar force to the reasons that the company should be restrained in the latter business from assuming preferential facilities to itself, or extending them to anyone else. (12 Harris, 378; Law Rep., 4 H. L. 237; 1 B. & S. 162, and other cases cited hereafter.)

Railroad companies have in this respect an immense power whose abuse cannot easily be prevented. On all questions under this head, therefore, to guard against the danger of encroachment on rights of the public, the charters of the companies are construed strictly against themselves and liberally in favor of the public. (7 M. & G. 288, and see 6 El. & Bl. 108, 109.) This applicability of the rule of strict construction to such question of possible encroachment is obviously consistent with its inapplicability to the converse question of the right of the companies to compete fairly with any one of the public in the accessorial business.

The general relations of the defendants to the public include those to the complainants considered as one of the public. Such relations having been defined, we may, before applying the principles which have been stated, consider the relations of the complainants to the public and to the defendants.

The complainants appear to have been engaged in the business of express carriers very extensively, and perhaps without always encountering such free competition as to promote the interests of the public.

Express carriers intervene between a principal carrier and persons usually unknown to him whom they represent at each end of his line of transportation. Those whom they represent at the place of departure may be called transmitters to distinguish them from consignors, known as such to the principal carriers. The parties who are to receive the goods at

Co., 21 Am. Law Reg., vol. 12 N. S., pp. 282, 283; and C. J. Redfield's note, p. 285; also 3 Taunt, 264, there cited.

the place of destination may, in order to distinguish them from consignees known as such to him, be called *destinees.**

Middlemen are always at hand everywhere to execute any incidental function of transportation which a principal carrier may omit to perform. They may have more or less independent relations to the principal carrier. Before and since the commencement of the use of locomotive steam-power upon land, middlemen have acted variously in different countries, not merely as agents of transmitters and of destinies, but also as, in certain respects, carriers or sub-carriers between them. There are neither in Europe nor in this country middlemen whose relations, public and private, are, in all respects, such as the complainants define their own to be. Their former contracts with the defendants indicate, however, that what they now claim as independent rights were, in part at least, stipulated for by them as privileges to be enjoyed only at sufferance or until determined by notice.

When the rights and obligations of those here called express carriers are properly defined, their legal relations will appear to be, in general, very similar to those of certain European middlemen, though, in some special respects, perhaps, different from any in Europe. Differences may arise from local usages of traffic and other commercial intercourse. The French law, differing in one respect from our own, and from that of England, has always obliged all railroad companies acting as carriers in any wise however, to make deliveries at the doors of all known consignees who do not dispense with such delivery. (Duverdy, §§ 224, 227, 228, pp. 321, 325, 326.)

But the French companies cannot insist upon performing such service for consignees who, dispensing with it, choose to receive the freights at the railway depot or station, or delivery office (Ibid., §§ 225, 226, 229, pp. 322, 323, 328); and those companies are under no obligation to collect freights from consignors. A French middleman who, as representing

* The word *destinatary* would be objectionable because in France *destinataire* has a more general application. See Duverdy, § 3, p. 20.

transmitters, carries goods to a railway reception office, depot, or station, often represents also destinees, in which case he, on their behalf, or as being himself both consignor and consignee, dispenses at the other end of the line with all service of the company by horse-power, and renders it himself, making the ultimate deliveries.

In England, so long as the railroad companies were carriers by rail only, middlemen conducted the auxiliary business on a large scale, not limiting it exclusively to light, small matter. English railroad companies very soon became desirous of participating in the profits of such business, or of appropriating all the profits of it to themselves, or to those whom, with or without a profitable consideration, they favored. At first they seem to have either farmed the business out, or to have conducted it through contractors or otherwise favored subcarriers. Afterwards, the companies, or one or more of them, engaged in the business themselves. In each of these progressive stages, litigations occurred from encroachments by the companies upon rights of middlemen desirous of maintaining, as carriers, independent relations with transmitters and destinees. Chief Justice Erle called such middlemen intercepting carriers. The designation was inapplicable because they were engaged in a useful business which had been legitimately established before the railroad companies were directly engaged in it, and because it was, after they engaged in it, a business proper for the most unrestricted competition.

The defendants, and, it is believed, most of the railroad companies in the United States, have heretofore either farmed out to express companies the business of collecting and delivering the light and small freights transported in fast lines, or have conducted it through such companies, as contractors.

All such conventional relations of either kind between the complainants and the defendants terminated, as their contracts had provided, when sixty days from the time of the notices expired.

The defendants now both carry such freights by rail, and use horse-power of their own to collect and deliver them, as

they were formerly collected and delivered by the complainants. The defendants profess that they have no purpose to exclude anybody from the business of rendering like service by horse-power to the public for profit; and seem particularly to disclaim the intention to hinder the complainants from participating in such business.

The defendants ought not to be impeded in the execution of their purpose, if it really is to reduce charges to the public by promoting competition, or if it is to participate fairly in the profit of the use of the accessorial horse-power without unreasonable exaction from the public.

The subjects of dispute may be classed under two heads. The first includes the complainants' demand of certain facilities and accommodations in their express business. The second includes the alleged pecuniary overcharges, to which they object. The arguments on their behalf under the second head are generally well founded; but are, in a great measure, fatal to their own pretensions under the first head.

It has already been said that they have no present conventional rights. It might, therefore, seem unnecessary to inquire whether, under former conventional arrangements, they had a covert monopoly or any undue facilities or advantages. Indeed, the complainants are not understood as now insisting upon preferential facilities to themselves in right of past conventional relations. That contention would be palpably absurd. But they do insist upon receiving facilities and accommodations of great expansion, which they certainly endeavor to define by the standard of the former practical relations. The most favorable way of stating their pretension is that they claim facilities and accommodations proportional to the actual and prospective expansion of their own express business. If such facilities and accommodations are neither preferential to themselves, nor inconvenient to others, the demand may be reasonable. But if they are exclusive or preferential, their allowance would promote, if not perpetuate, monopoly. The question heretofore considered has been, when they were preferential, not whether a railroad

company must, but whether it can, allow them. On this latter point, Cockburn, C. J., said that, "if an arrangement were made by a railway company whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favorable terms than those bringing a less quantity, although the Court might uphold such an arrangement as an ordinary incident of commercial economy, provided the same advantages were extended to all persons under like circumstances, yet it would surely insist on the latter condition, and would interfere in the case of any special agreement by which the company had secured to a particular individual the benefit of such an arrangement to the exclusion of others." (5 C. B. N. S. 354, and see, in 1 B. & S. 160, the observation upon 6 C. B. N. S. 639.)

Such is the limit of the corporate power. The contention that the company is under a compulsory obligation to allow such a preferential advantage is novel.

These remarks are applicable to the question whether the complainants can reasonably require to have, in a passenger train, a car furnished by themselves. The question depends upon relative considerations, in which the convenience of others, not less than of themselves, must be consulted with a view to arrangements of the trains, and to accommodations in and out of depots and stations, etc.

The complainants cannot reasonably require any space to be set apart for their exclusive use in a car of the defendants in such a train. If the space be vacant, those who first bring goods ought to have it. If it be filled, the goods in it cannot be displaced.

The requirement, as of right, for an agent in charge of the complainants' express matter, of any other accommodation or place in the trains than that of an ordinary passenger under the control of the company's police of the road, seems to be quite unreasonable.

More unreasonable is the pretension that he can, as a passenger, carry, without other payment than as for baggage, a trunk which contains express matter.

The complaint that the defendants do not allow to express carriers the use of the platforms and landings, etc., at the depots and stations, appears to be connected with a dispute of the right of the defendants to establish offices and warerooms of reception and delivery away from depots or stations. The question implies that the offices must be conveniently situated for the accommodation of the public as well as for purposes useful to the defendants. The question, thus qualified, seems to admit of no answer but an affirmative one.

It has been so decided in France (Duverdy, § 229, p. 328), and has never been disputed in England, where such offices are in many cities and principal towns. (See 6 El. & Bl. 110; 11 C. B. N. S. 787.) Professor Parsons intimates that most carriers have a receiving office or depot, or station, or place of reception of some name. (On Contracts, I. 653, Bk. 3, ch. 12, s. 8.) Indeed, even express carriers have, it is believed, places of reception and delivery distinct and more or less distant from the places where their other business is transacted. These are not matters with which a judicial tribunal can meddle, unless an evil motive and effect is justly attributable.

The argument for the complainants, citing 12 Harris, 378, and 57 Maine, 188, admits (though perhaps without an intention to concede) that the defendants cannot allow to the complainants, or to any other express carrier, facilities or accommodations amounting directly or indirectly to a monopoly or partial monopoly. A leading English decision (10 M. & W. 399, pl. ult. of head note), cited with approval in the case in 12 Harris, shows that no advantage, however small, could be preferentially allowed by the defendants to any such party as the complainants.

Thus the defendants may appoint a reasonable hour of the day or night for the closing of their office for the reception of freight. But they cannot receive for themselves as carriers, or for the complainants, or for any other favored party, at a later hour. (6 C. B. N. S. 639; 12 C. B. N. S. 758; 1 B. & S. 112.) In a case of this kind in England the peculiar views of

Erle, C. J., caused, at one time, a division of opinion upon the point. (Law Rep., 1 C. P. 588.) But the rule of decision was afterwards re-established. (Law Rep., C. P. 194.) If no such hour has been appointed, the complainants cannot require that any freight be received which is not brought a sufficient time before the departure of the train to allow convenient reception, loading, booking, way-billing, etc.; and cannot require that any part of the latter business be transacted by their own agents unless agents of other middlemen are allowed the privilege. Other examples might be cited. (See 11 C. B. N. S. 787, and other books.)

The complainants do not allege their willingness to submit themselves, in such respects, to reasonable regulations of their business, to which public interests require their subjection. Their footing in equity is, therefore, very insecure, even where they might otherwise, on certain other points, be entitled to relief. They certainly are themselves endeavoring to encroach upon rights of the public; and any partial success of their present effort might prevent equal competition, or embarrass the defendants in transacting proper business at their depots or stations, or at the approaches or outlets, or at the offices of delivery and reception.

The remaining questions are those of alleged overcharges by the defendants.

If we recur to the analysis of the charge formerly made by the defendants for carriage only by rail, it will be understood that their present charge, being a single aggregate sum, includes an additional amount or elementary value. It is the amount of compensation for the additional service which they offer to render by horse-power in collecting and delivering the freights. It is to be regretted that they did not, after experience of the injurious mistakes of English railroad companies, publish the definite amounts of the intended additional charge. This would have given a fair opportunity of competition by any parties willing to serve the public for less, or for the same rates, and have prevented the possibility of any continued monopoly of the business by the complainants, or

fore, is an authority rather against than in support of the present argument for the defendants. Indeed, if it had even been expressly enacted that they might charge what they should think fit, this would mean what they should reasonably think fit. Martin, B., so instructed a jury (11 Exch. 744); and, in banc, though it was not necessary to decide the point, there was a dictum of Alderson, B., to the same effect. (Ib. 749, 752.) This dictum, which was afterwards cited without dissent by Williams, J. (5 C. B. N. S. 117, 118), and with seeming assent by Willes, J. (Ibid., p. 120), has the support of a previous decision of like tendency (12 East, 157), and is conformable to a rule of general jurisprudence for the interpretation of such words. (Dig. 19, 2, 24 pr. 5 Co. 100, Poth. Obl. N. 48; 2 Johns. 395, 401; 4 Serg. & R. 1; Baldw. 388; 4 Bingh. N. C. 105; 4 El. & B. 256.) But the words of the defendants' charter suggest, independently of the argument, no such question.

If the charter had contained words limiting the rates of the freight money, or, what would be the same in effect, limiting the addition which might be made to the amount of tolls, the defendants could optionally have charged the maximum rate, whether it would otherwise have been reasonable or not. (12 P. F. Sm. 228, 229.) They might, therefore, in that case, have established a tariff of charges equal to, or below, the maximum rates; and might have made such occasional impartial abatement from the tariff or ordinary rate as they saw fit. There is no legal necessity that such abatement should be absolutely uniform if the occasional deviation is impartial. But if the education is disproportionate to any exigency which may have caused it, this will be strong evidence that it is neither reasonable nor impartial. The two last sentences repeat what had been previously said. Arbitrary discrimination is, of course, illegal; and so is discrimination for the advantage or disadvantage of one person, or of a select few. There can be no abatement for the advantage, direct or indirect, of the company itself, or of its managers or officers or agents or servants or friends. The language of the

Supreme Court of the State (12 Harris, 381-383; 11 Wright, 340, 341; 12 P. F. Sm. 230) is in this respect conformable to what has been repeatedly decided as to railroad companies in France and in England, and is generally recognized as law throughout the United States.

The defendants, however, contend that English decisions upon the subject are not of authority here, because English statutes prescribe not simple reasonableness in the charges, but equality, which, it is argued, means ratable or arithmetical, as distinguished from relative equality, except where it is otherwise positively enacted. This view has not been taken by the Supreme Court of the State; nor is it correct. In one of the cases last cited, that Court said that those English statutes are but declaratory of what the common law is. (11 Wright, 340, 341.) This observation is practically and almost literally correct. The English enactments, where they give a latitudinary option as to rates of charge within a prescribed maximum, provide that such charges must be made equally to all persons in respect of like things under like circumstances. The requirement of like things and like circumstances, if omitted, would be implied. This was the meaning of the Supreme Court. The English statutory requirement thus imports relative equality, not simple ratable equality. English courts have so understood and applied the enactments. Moreover, in many of those English cases whose authority the argument would impugn, the question of reasonableness was discussed; and in some of them it was decided as distinct from that of simple equality.

English statutes, in allowing the great latitude of charges, have, however, in favor of railroad companies, altered, in some degree, the rule of the common law, which required the charge of a common carrier to be always reasonable. In the compensating requirement of equality, English statutes have, in some degree, substituted a legal criterion of rightfulness of the charge for what was, at common law, only evidence or part of the evidence for a jury on the question of reasonableness. In an action at law inequality in charges had

thus previously been evidence of unreasonableness, the effect of the evidence being determinable by the verdict. (See Law Rep., 4 H. L. 237, 239.) In Pennsylvania, the question is wholly for the jury, except so far as the rules of the common law may be qualified by a statutory limit, or prescribed maximum, of the charge.

It may be observed that a court of equity, where the question, whatever may be its form, is in the least doubtful, awaits the decision of it by a court of law. (1 H. L. 35; 3 Eng. R. R. Ca. 561.)

In the English decisions, if we consider the importance of the questions, and the earnestness of the contentions, it will appear that, instead of the contrariety of opinions imputed in the argument, there has been a general uniformity. The questions, however elaborated, have, indeed, perhaps, been more important than difficult. If they were considered anew, independently of the authorities, the decisions would certainly, on original principles, be the same.

We have now reached the first of the two questions in the present case. It is whether to grant an interlocutory injunction restraining the defendants from including any rate for the use of horse-power in their charge to the defendants, who do not use it, or from otherwise making the extortionate overcharge.

If the complainants, in the simple relation of one of the public, had, submitting to all just and proper regulations of the defendants for the promotion of the public interest, and the administration of their own franchises, asked only protection by such an injunction in the lawful business of competing carriers, it is possible that they might have had such relief before obtaining a judgment at law, or perhaps even interlocutorily, though this would be contrary to the ordinary course of equitable procedure. (1 H. L. 35.) To justify such a departure from the ordinary course, the legal right in aid of which the injunction is asked must, however, be quite free from doubt.

It is not necessary to decide whether this would have been

such a case. The complainants have not so proceeded as to enable them to ask interlocutory relief under this head. If they "ask equity, they must do equity," or in good faith aver a readiness to do it. This they have not done, either in or, so far as appears, outside of their bill. Possibly this may not insurmountably impede them at the final hearing, when a decree may be so framed as to adjudge against them the questions *upon* which their positions are untenable. But these questions cannot be now so decided. To leave them open, and at the same time place the complainants interlocutorily on the footing of a successful litigant, would be uneven justice.

The same reasons precisely do not apply to the remaining question. It is that of the packed parcels.

What is called in England the packing of parcels, and in France groupage *à couvert*, must be distinguished from the case of loose or unpacked parcels, groupage *à découvert*. Neither designation should be understood as applicable to articles of such description as, for purposes of transportation, meal, grain, coffee, sugar, etc., when sent in large aggregate quantities, are usually made up of several bags or parcels.

The case of unpacked parcels occurs where articles or parcels, which might be united as a single package, are consigned by, or to, the same person. In such a case, where no legislation applies, the railroad company, as carrier, has a right to charge for every package or parcel, as a several subject of transportation. (6 El. & Bl. 77.) It seems that in Europe the right has been very often waived, and a single charge for the whole has been made by weight, as if they had composed a single package. Occasional acts of such liberality, causing accidental inequality in charges, do not impair the right of making the charges separately in other instances. (1 B. & S. 154.) But if it is dispensed with systematically to persons in any kind of business, the dispensation must be extended alike to all without any discrimination against a middleman who sends the unpacked parcels consigned to himself or to his own agent. (7 M. & G. 291, 292.) But the

company may fairly discriminate between such a case and one in which, though the consignor is the same person, the parcels are distributable among several persons at the end of the line. (4 C. B. N. S. 63; 1 B. & S. 165, 166.) The decisions of some of the questions in some minute particulars have been somewhat affected by British legislation. (Compare 7 M. & G. with 1 B. & S.)

The case of packed parcels, before railroads were known, occurred thus: A middleman representing, as a carrier, one or more transmitters of numerous articles or parcels to several destinees, whom he also represented, inclosed or packed the articles or parcels together so that they composed a single item for transportation by a principal carrier who knew only the middleman and his agents. The parcels thus packed were charged as for a single package, if it was of convenient bulk and weight.

When the principal carrier is a railroad company, the middleman carries the package by his own horse-power to the depot, station, or office of reception, consigning it from thence, in his own name, to himself or his own agent at the place of destination, where he receives it at the railway depot, station, or office of delivery, and carries it by his own horse-power to the respective destinees. The rates for carriage by rail are such as enable the middlemen so to adjust the bulk and weight of the package to the tariffs of charges that the profit of the railroad company is much smaller than if the parcel intended for every destinee had been a separate small package. This detriment, though perhaps a hardship to the carrier by rail, was no reason that he should object to receiving and carrying the packed parcels, unless the package in mass was of inconvenient bulk or weight for the intended transportation.

Yet where no such inconvenience could be suggested, English railroad companies formerly refused, as the defendants now refuse, to receive such package unless upon payment of the aggregate sum which would have been chargeable for the carriage of the several parcels if each of them had been

a separate package. An English judge of distinguished eminence, Willes, J., said that it was some time before he could understand that such a question could be seriously argued. (5 C. B. N. S. 119.) The argument was made intelligible only by dividing the question.

As it was divided, the points were: first, whether the aggregate charge of the full sum of the rates for several packages could be sustained; secondly, whether the carriers by rail could make a small addition to the charge, as for a single package, in order to cover the risk of contingent liability to actions at the suit of unknown transmitters, destinees, or owners of the several parcels or articles inclosed.

The reasoning on the first point against the railroad companies was unanswerable. Since the decision in 10 M. & W. 399, the contention has in England been principally upon the second point. In the present case, the *argument* has been upon the second point, with, however, an unwarrantable *assumption* of a conclusion upon the first, as if it were consequential.

In England, juries "have often negatived, that in point of fact, carriage" of the packed parcels, "for *collecting carriers* imposes greater *risk* or expense upon the railroad company," than would be incurred if they were not packed. (Law Rep., 4 H. L. 247; 11 Exch. 758, 759; 5 C. B. N. S. 112, 113.) The courts, approving the verdicts, have decided that "such carriers are entitled to have their packed parcels carried *upon the railway* for the same price as other persons."

As to risk of loss from carelessness or from pilfering, there may be less risk than if the parcels were separate. The question was also put to juries in England, "in respect of the supposed liability" of the railroad company, as the principal carrier, "to several actions" at the suit of unknown parties owning the goods. On this point, it has been said that there has not, in England, been a single instance of such a suit; and the language of English judges might seem to import even a doubt whether the suit would be maintainable. This part of the question is differently considered in the United States.

There is no doubt, either on principle or on authority, that several actions, at the suit of the respective owners, are maintainable (6 Howard, 380, 381; 6 Binney, 129; Redfield, § 169, 4th ed., vol. 2, p. 18); and actions at their suit are brought much oftener against the railroad companies than against the middlemen. If the principal carrier is regarded only as an agent, he may be sued by the unknown party interested. If the public employment as carrier is alone considered, immediate privity of contract is not essential to the right of action against him for an injury suffered through his default.

The question was, moreover, under the English Carriers Act of 1830, very different from what it was in the United States. An English act of 1854 has nearly restored the English law in this respect to what it had been before 1830. The difference was that in the intervening period an English railroad company, as a common carrier, could exempt itself from liability even for culpable negligence by making its engagement conditional.

The irrational state of English law on the subject in that interval, and the difference now in question, were fully explained in a case in the House of Lords in 1863. (10 H. L. 493, 495.) It is, however, to be noted that one of the English verdicts, judicially approved, on the question of the risk of suits, was after the new act of 1854. (5 C. B. N. S. 112, 113.)

The question left thus to English juries was in great part matter of law. But matter of fact is involved in it; and here, as in England, the law on the question of packed parcels must be administered through verdicts of juries. An English railroad company was legislatively authorized to make an additional charge for carrying packed parcels, and established an additional rate accordingly; but did not charge the addition to wholesale dealers who transmitted such parcels. Middlemen who were carriers, being compelled to pay the additional rate, sustained an action to make the railroad company refund it. The proof convinced the jury that the exemption of the wholesale dealers was preferential and habitual. (3 H. & C. 809, 849; affirmed, Law Rep., 4 H. L. 226.)

The defendants take the untenable extreme position that they can make the full charge as for separate packages. On this point, of course, the charge cannot be maintained. But the inquiry still open is whether a small addition to the charge for the package in mass may not be allowable to cover the risk of contingent liability to several actions.

This increases the difficulty of the complainant's case on the question of granting an injunction. In such a case in England, the Court in Chancery refused to grant an injunction until the right should be determined at law. (3 R. R. Ca. 538.) But the decision was mainly on the ground of the complainant's delay. The case already cited in 1 H. L. Ca. 35 is to the effect that, if the pecuniary excess of the charge was ascertained, an injunction would be proper after a judgment at law. But the case in Law Rep., 1 Exch. 32, under the auxiliary equitable jurisdiction conferred by the English common-law procedure act of 1854, indicates doubt whether, on the question of packed parcels, the uncertainty in the amount would not, even after a judgment at law, prevent the application of the rule of the former decision.

The distinction is, perhaps, over-nice, and the doubt may not be well founded. But here no judgment at law has been obtained; and there is an open part of the question of right which seems to be determinable at law only.

To meet the exigency of questions with railroad companies, whether as to their withholding reasonable facilities, or subjecting to undue or unreasonable prejudice or disadvantage, or as to the giving of any undue or unreasonable preference or advantage, a summary jurisdiction has been conferred in England upon the Court of Common Pleas by a statute (17 and 18 Vict. c. 31, ss. 3-6). But no other English court of law has any such jurisdiction; nor has the English Court of Chancery. If the creation of such a summary jurisdiction here is expedient, it should not be vested in courts of the general government. On the continent of Europe the questions are judicially cognizable only for the enforcement of legislative and executive regulations. The decision of questions

like the present is, under most European governments, by an executive department and summary.

The proportions of the subject are certainly enlarged here beyond the usual measure of judicial administration. But the experiment of an executive board of railroad commissioners, where tried, seems to have failed of success.

All that can be done at present is to refuse the interlocutory injunction, giving to the complainants leave to proceed at law, during the pendency of the proceedings in equity, if they shall be so advised.

Thus far, it has been assumed that the suit is by a competent party. The Adams Express Company is an association organized under laws of New York of 1849 (ch. 258) and 1854 (ch. 245), which confer certain powers and privileges possessed only by corporations; and enact that the associations may sue in the name of their president. But the latter act provides that nothing contained in it shall be construed to give them any rights and privileges as corporations. Notwithstanding this enactment, an association of this kind is considered even in New York a corporation for certain purposes. (15 How. N. Y. Pr. Rep. 172.) That it may extraterritorially be so considered for such purposes appears from a comparison of the case in 100 Mass. 531, affirmed in 10 Wallace, 567, with 13 Peters, 586, 591. It does not necessarily follow that such a joint-stock company can sue in this Court as a citizen of New York under the authority of the series of decisions beginning with 2 Howard, Sup. Ct. U. S. 497, which sustain such suits by corporate bodies of the ordinary kind. If the latter decisions apply, it is possible that, through comity, the express company may be allowed a capacity to sue at law in the name of their president, extraterritorially as well as in the State of New York. (Compare the Chamberlain of London's Case, 5 Co. 62 (*b*), 63 (*b*), with 10 Wallace, 567, and 13 Peters, 586, 591.) But even in that case it might in a suit in equity be necessary to unite the express company as complainants. As this omission is, of course, amenable, the case may, in its present stage, be con-

sidered as if that company were already complainants of record. But whether the amendment be made or not, the question of jurisdiction will be contestable. It cannot be decided without further argument than has been heard by the Court.

Under the stockholders' bill there is very little to be added. If the foregoing views are correct, the controversy, properly described, is not whether the defendants have usurped a franchise, but whether their franchises are administered rightly in special respects. Independently, therefore, of the reasons of a more general kind stated and explained by the circuit judge, the two questions of overcharging to which the numerous points of argument have been reduced, if cognizable under this bill, cannot be considered until the final hearing.

McKennan, Circuit J.—I concur in all respects in the opinion of Cadwalader, J.

District Court. June 6, 1873.

ADMIRALTY.

THE ADDIE HALE.

Unusual quarantine expenses arising from the existence of small-pox at the port of destination should be paid by the freighter where, by the terms of the charter, he was to pay all port charges.

Libel in cause of affreightment.

CADWALADER, J.

Under the commercial head of health laws are included quarantine laws, under which the charges upon sea-going vessels for foreign voyages are classed as port charges. In this case, the existence of small-pox at the port of departure caused an unusual increment in the quarantine charges at Havana, the port of destination. The freighter was, by the terms of the charter, to pay all port charges. The increment in question was not caused by any default of the vessel. The question, therefore, cannot be stated in any form rendering it doubtful.

Decree for libellants, with costs.

DISTRICT COURT. JUNE 19, 1873.

EXTRADITION.

IN RE BENJAMIN PALMER.

1. The lowest grade of inexcusable homicide is within the *generic* term of murder, as used in the treaty of extradition of 1842, between the United States and Great Britain.

2. The extradition of a fugitive being demanded under this treaty, the tribunal where he is found will not inquire as to the grade of guilt, and not being competent to acquit or convict, the warrant must issue.

3. Where a judge had ordered a commitment that a warrant of extradition might issue, the Secretary of State, upon a review of the case, refused to issue the warrant and the accused was discharged.

PETITION by the British Consul at Philadelphia for the extradition of Benjamin Palmer, upon the charge of murder.

STATEMENT OF CASE.

By the depositions taken in the case, it appeared that Benjamin Palmer shipped on the barque J. B. Duffres on April 15, 1873, as boatswain or second mate; that on June 8, 1873, while the barque was at sea, the morning being squally, and the ship not steering well, the master ordered Palmer to lower the spanker. At the time this order was given it was Palmer's watch on deck. In his watch, among others, was John McDonnough, who, when the order was given, went to the throat halyards. The sail was lowered about halfway down, when it jammed upon the mizzen mast. Palmer got on the spanker boom to clear the sail, when suddenly the gaff, weighing about five hundred pounds, got clear and was coming down by the run, he being immediately under it. The master, seeing the danger, quickly called to him, "Look out, Mr. Palmer, the gaff is coming on you." Palmer instantly jumped from the boom onto the starboard side of the ship. McDonnough had left his position at the throat halyards, and was standing abreast of the mizzen rigging in the alleyway between the rail and the afterhouse, on the starboard side of the ship. As Palmer jumped, he and McDon-

nough came together. One of Palmer's feet struck McDonnough in the stomach and so injured him that shortly afterwards he died. As to whether or not Palmer kicked McDonnough, the depositions were somewhat contradictory. The master testified that as Palmer jumped "to save himself from going overboard, he caught the mizzen rigging with his hands; that brought his feet about opposite McDonnough's stomach. The boatswain's feet came in contact with McDonnough about his stomach." Four of the crew, however, agreed that the distance between where Palmer struck the ship when he jumped and where McDonnough stood was several feet; that the toe of Palmer's boot struck McDonnough, but whether it was accidental or purposely done no one testified except one man, who said it was "accidental out of passion." All of the witnesses agreed that Palmer had no quarrel with McDonnough; that he always acted kindly towards all the men, and that after McDonnough was hurt he endeavored to restore him.

Silas W. Pettit and *John R. Read* appeared for the Government of Great Britain, but made no argument, as the Court did not desire to hear any, except on behalf of the accused.

J. Warren Coulston, for Palmer, argued:

1. The proof in all cases under a treaty of extradition should be not only competent, but full and satisfactory, that the offense has been committed in the foreign jurisdiction sufficiently so to warrant a conviction, in the judgment of the magistrate, of the offense with which he is charged, if sitting upon the final trial and hearing of the case. No magistrate should order the surrender short of such proof. (Ex parte Kaine, 3 Black. C. C. 10.)

2. The Court must pass upon the weight as well as the competency of the testimony, and a fugitive is to be surrendered upon such evidence only as, being submitted to the jury, would probably secure his conviction of the offense alleged. (In re Henrich, 5 Black. C. C. 414; In re McDonnel, 5 Leg. Gaz. 236.)

No judge would sustain a verdict of guilty of any offense under the testimony in this case.

3. The treaty requires the specific application of the definitions to be conformable in particular cases to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise requires the application of local rules of decision as to the sufficiency of the evidence. (Traugott Müller's Case, 5 Philadelphia R. 289 s. c. I. Cad. 631.)

The evidence is not sufficient to sustain the charge of murder. In the worst aspect of the case it could only be manslaughter, which, under the law of Pennsylvania, may be either voluntary or involuntary. Manslaughter is voluntary when it happens upon a sudden heat, involuntary when it takes place in the commission of some unlawful act.

5. It is clear that the extradition treaty between the United States and Great Britain (8 Stat. at Large, 576) does not apply to manslaughter. If this be doubtful, the Court should follow the analogy of the act of Congress of March 3, 1825 (4 Stat. 115), providing for the punishment of the crime of murder on the high seas, on board of an American vessel. It has been held that this act does not include the offense of manslaughter. (The United States *v.* Armstrong, 2 Curt. C. C. 451.)

CADWALADER, J.

The homicide in question, having occurred on the high seas in a British vessel, was committed within British jurisdiction. Whether it was an excusable homicide, and if not, what was the grade of guilt, are questions for the decision of a British tribunal. This does not preclude the observation that if a crime has been committed, it was of the lowest grade of inexcusable homicide. The offense in question was, nevertheless, if punishable at all, within the generic description of murder, as the word is used in the treaty of 1842; and, as no tribunal in the United States can exercise jurisdiction to convict or acquit, the warrant of extradition must be granted, if the application for it shall be insisted on. It

may not be improper to add that, if the offense had been cognizable here, I would have admitted the accused party to bail during the hearing, because the peculiar circumstances of the charge would have justified such an exception from the ordinary course of procedure in cases of homicide.

I consider the application for extradition as made by Sir Edward Thornton, the diplomatic representative of the British Government, though it is made in the name of the consul. It occurs to me that the consul may perhaps desire to communicate with Sir Edward Thornton before deciding whether to insist on the application for a warrant. The case may therefore stand over until Wednesday next, unless the accused party objects to the delay.

Afterwards, June 25th, 1873, the British Consul praying that a warrant of extradition issue, it was issued accordingly, and is hereto subjoined:

"And all the depositions, examinations, warrants, orders, and other documents are therewith returned and certified by the judge, at Philadelphia, on the day last aforesaid.

"UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss:*

"To the Marshal of the United States:

"In the matter of Benjamin Palmer, charged with murder, on the British barque J. B. Duffres on the high seas.

"This case having been heard before me, on petition of George Crump, Esq., acting consul for Her Britannic Majesty at the port of Philadelphia, that the said Benjamin Palmer be committed for the purpose of being delivered up to justice, under the provisions of the treaty made between the United States and Great Britain on the 9th day of August, A. D. 1842, I find and judge that the evidence produced against the said Benjamin Palmer is sufficient in law to justify his commitment on the charge of murder, had the crime been committed within the United States.

"Wherefore, I order that the said Benjamin Palmer be committed pursuant to the provisions of said treaty, to abide the order of the President of the United States in the premises. Given under my hand and the seal of the said Court at Philadelphia, this twenty-fifth day of June, A. D. 1873.

"JOHN CADWALADER,

[SEAL.] *"Judge"*

NOTE.—After the evidence in the case had been certified to the Secretary of State, the case was re-argued before him by the counsel for the prisoner. The Secretary of State finally refused to issue the warrant of extradition, and Benjamin Palmer was released from imprisonment. While the case was pending in Washington, the British minister, Sir Edward Thornton, raised the question whether the Secretary of State has the right to refuse a warrant of extradition, after a judicial tribunal had certified under the treaty that the evidence was sufficient to sustain the charge made against the accused, and called the attention of his government to the matter for the purpose of obviating the difficulty in the future, if possible.

DISTRICT COURT. OCTOBER 19, 1873.

ADMIRALTY.

ALFRED MAYER *v.* NITER BASSON, MASTER OF THE GERMAN SHIP ELENA.

A treaty reserved the cognizance of differences arising on shipboard to the consuls of the respective nations, but excepted such as were of a nature to disturb the public peace. *Held,* That the Court has no jurisdiction in a proceeding where the question was as to the legality of the shipment of one of the crew. It is otherwise as to an assault and imprisonment of which he had been the subject.

HABEAS CORPUS. CAPIAS.

STATMENT OF THE CASE.

The case involved the construction of the treaty between the United States and Germany, and the power of our courts to interfere for the protection of foreign seamen against the

wishes of the consular authorities of their own countries. The defendant in the case, Niter Basson, master of the German ship *Elena*, was arrested and held to bail on a *capias* issued on the affidavit of Alfred Mayer, who had been a seaman on board his vessel, setting forth that the plaintiff had shipped on July 21st, 1873, at Liverpool for a voyage to Philadelphia, and there to be discharged. The agreement was made at night with the agent of the captain. The following morning he went on board with this agent at 8 o'clock, as the vessel was about leaving the dock. Plaintiff went to his work, relying upon the promise of the agent, who went up to see the master to make his shipment all right.

He was not shipped before the consul, as required by the German laws, and never signed any articles. On the arrival of the vessel here, September 17th, he requested his discharge, which was refused by the defendant, who threatened to imprison him if he persisted in leaving the vessel, and finally put him in irons, and so confined him an hour and a half. When released he left the vessel, and September 19th he was arrested by the United States marshal on a warrant issued by Commissioner Biddle, and taken to prison, where he was detained eight days, subject to the order of the German Consul, after which he was discharged. It appears that the arrest was made upon a requisition addressed to the Federal authorities, signed by the German Consul under the provisions of the treaty of December 11th, 1871, authorizing the various consuls to call upon the local officers for assistance in arresting and detaining the crews of their vessels until they are ready to sail, for the purpose of carrying them back to Germany, the object being to prevent desertion.

The requisition, however, is required to be backed by the muster roll or shipping articles containing the sailor's name and contract signed by himself, in order to establish that he is a member of the crew, and that, under the terms of his agreement, he is obliged to return to the vessel. This man's name not being on the articles at all, and his service having expired, the master was unable to show this, but gave to

the consul the name of Jan Muland, a man who had also been shipped in Liverpol by the same agent for the round voyage, and had signed articles, but had deserted before the voyage began. Plaintiff was arrested and imprisoned as Jan Muland, the purpose being to compel his return to the vessel and sail back to Germany. A writ of habeas corpus was immediately issued by Judge Cadwalader, whereupon the consul at once discharged the prisoner without a hearing upon the writ.

The original affidavit set forth in substance the foregoing facts, and the defendant was arrested on a capias for assault and battery, bail being fixed at $2,000, and his consul becoming his surety. A rule was taken by defendant to quash the writ, and counsel for the consul argued that the affidavit disclosed a contract by plaintiff to serve on a German ship, subject to German law and discipline; that, under the terms of the treaty, the agreement itself and the plaintiff's right to his discharge and wages could be decided by the consul only; that the grievances complained of arose out of a disagreement between plaintiff and defendant as to the terms of said contract, and hence the court could have no jurisdiction, but plaintiff would have to apply to the consul; that the imprisonment was effected by a consular requisition to the United States authorities, and involved in it the fact that the German Consul had exercised the jurisdiction which the treaty had made exclusive.

The language of the treaty relied on is as follows: "The consuls . . . shall have exclusive charge of the internal order of the merchant vessels of their nations, and shall have the exclusive power to take cognizance of and determine differences of every kind which may arise, either at sea or in port, between the captains, officers, and crews, and especially in reference to wages and the execution of mutual contracts. Neither any court nor authority shall interfere in these differences, except in cases where the differences on board ship are of a nature to disturb the peace and public order in port or on shore, or where persons other than the officers and

crews of the vessels are parties to the disturbance." (Article 13.) It was argued for the plaintiff that an illegal assault had been committed, that, plaintiff's name not being on the articles, the consul had no right to order his arrest, and that he was no longer a member of the vessel's crew.

The Court, after holding the matter under advisement, quashed the writ on the grounds that the complaint appeared to be that plaintiff was still held as one of the crew of the vessel—a matter over which they had no control; and the assault and imprisonment appeared to have been stated merely as a matter of aggravation, and not as a distinct cause of action.

Without delay, a second suit was commenced between the same parties, the affidavit charging an assault and battery, in that defendant arrested and imprisoned plaintiff as Jan Muland, whereas he was not Jan Muland, and defendant was re-arrested and held in $1,000 bail. A rule was immediately taken by Mr. Parsons to quash this writ, and an argument was made upon practically the same ground as before.

The Court this time, however, discharged the rule, saying that there was a distinct assault and battery sworn to, over which they clearly had jurisdiction, and any special matter of defense or pleas to the jurisdiction must follow the usual course and be specially pleaded, and in answer to the suggestion that large ships would be delayed by the ruling and commerce impeded, the Court observed that even large ships must be subservient to the law.

DISTRICT COURT. JANUARY 31, 1874.

ADMIRALTY.

BADEAU *v.* THE OWNERS OF THE IDA M. COMMERY.

In a case of personal injury to one of the ship's company there is no such continuing duty on the part of the owners as in a similar case on

land. They are not liable for injuries originating at sea, or for injuries consequential upon an occasional negligence of the master, where the ship, at the port of departure was in a seaworthy condition and the master of adequate experience.

LIBEL in a cause of personal injury to one of the ship's company. In Personam.

STATEMENT OF THE CASE.

The libel alleged that the brig ran aground outside of a wharf at Philadelphia; that an offer was made by the master of the tug which had towed her in port to take her off and bring her alongside the wharf; that the master of the brig refused, preferring to await the action of the tide, and making her fast to the wharf with ropes in the meantime; that afterwards he, the mate, and all the crew, except libellant, went ashore, leaving the libellant, who was the cook and not a skilled seaman, alone on the vessel; that when the tide rose the vessel floated, and there was great strain on the hawsers, which were of inadequate strength, placing her in a situation of great jeopardy; that at this time, it being then nine at night and very dark, the captain came on board and ordered the libellant to cast off the starboard line, which, from its nature, the darkness, and his want of experience, was a dangerous service; that in attempting to perform it he was thrown down and received permanent injuries: all which he specifically alleged as negligence of the master, for which the owners were responsible in damages.

The answer was a general denial of all the important facts, as also of the negligence and the injuries.

CADWALADER, J.

It appears that the master of this vessel was of adequate experience to render him a competent navigator, and that the vessel was seaworthy. In such a case, the owners are not liable for a personal injury to one of the ship's company consequential upon an occasional negligence of the master, whether of commission or omission.

A vessel equipped and on a voyage represents an organized part of the social system of the country in which she is owned. The master stands in a twofold relation, that of an agent of the owners, and that of a juridical person, the latter expression being seldom used in the courts of admiralty of the United States or of England, but being here of useful significance.

If a vessel is unseaworthy either in herself or through incompetency of her navigator, the owners are liable for any injury to one of her company caused by the unseaworthiness if not too remotely consequential. Thus I am reported to have decided that where a vessel went to sea without having been sufficiently inspected in the upper rigging, and, from a defect in this part of it, a mariner fell and suffered injury, the owners were liable. This decision was directly analogous to some decisions upon machinery on land which have been cited.

But the reason of the decisions upon cases arising on land fails, where the cause of the injury originates at sea. On land the owners have a continuing duty to all the world. No analogous duty exists while the vessel is abroad. They cannot revoke the agency or supervise its execution; and are not liable for injudiciously continuing their confidence in an untrustworthy agent.

The case of the libellant, if otherwise maintainable, therefore fails, because, whether the master was culpably negligent or not, the owners are not liable.

Libel dismissed without costs.

CIRCUIT COURT. JANUARY 31, 1874.

INSOLVENCY.

RUSSELL *v.* THOMAS.

A defendant held in custody under a *ca. sa.* issued out of the Circuit Court of the United States applied to the Court of Common Pleas of Philadelphia County for his discharge as an insolvent. That Court having decided that the jurisdiction was in the Circuit Court he applied for his discharge to a commissioner of the Circuit Court, duly appointed and qualified to take bail and affidavits. *Held,*

1. That the jurisdiction is in the Circuit Court, and that even where such application is made by a person not arrested or detained in custody in any manner, the State courts would not have cognizance of any ulterior purpose of such a party to make the discharge, when obtained, available for his liberation in the Circuit Court.

2. The words of the Act of Congress of 2d March, 1867, directing that proceedings for discharge of an insolvent held upon *mesne* process or execution issuing out of the Courts of the United States shall be had before a commissioner appointed by said courts to take bail and affidavits, must be construed to have a constitutional meaning and application, and therefore, do not confer on such commissioners independent judicial functions, but such only as are amenable at every stage to the tribunal which issues the process.

3. A petition to the Court in the first instance indicated as the better practice.

4. Cases in which the discharge of an insolvent is authorized in the State Courts, defined.

5. Relations of the bankrupt and insolvent laws considered.

CAPIAS AD SATISFACIENDUM on a judgment in an action of deceit in the Circuit Court of the United States for the Eastern District of Pennsylvania.

The report of the Commissioner sufficiently sets out the facts. It is only necessary to add that an application for the defendant's discharge had previously been made to the Court of Common Pleas of Philadelphia County, and refused on the ground that the jurisdiction was in the Circuit Court. See opinion of Allison, J., referred to by Judge Cadwalader. The defendant was ultimately discharged by the Commissioner.

Nathan H. Sharpless for plaintiff.

David W. Sellers for defendant.

The following report was made by the Commissioner:

To the Honorable the Judges of the said Court:

Craig Biddle, a Commissioner duly appointed by your honorable Court to take bail and affidavits,

Respectfully represents,

That one John L. Thomas, on the 20th day of October, A. D. 1873, presented to him a petition alleging that he was held in custody by the marshal of this district, by virtue of a *capias ad*

satisfaciendum issuing out of your honorable Court, to collect a debt of $935.38, and asking that he be discharged from said custody, on giving bond to comply with the provisions of the Act of Congress approved March 2d, 1867, entitled "An act supplementary to the several Acts of Congress, abolishing imprisonment for debt."

The said petition was granted, and a bond given to the plaintiff in the suit by the petitioner, for his appearance before your Commissioner to apply for his discharge under the provisions of the Insolvent Laws of the State of Pennsylvania.

In accordance with the condition of his said bond, the petitioner presented himself on January 19th, 1874, at 11 A. M., before your commissioner, accompanied by his counsel, Mr. Sellers, filed proof of the publication of the notice required, and asked that the final hearing be proceeded with.

Mr. Sharpless, for W. D. Russell, the plaintiff on whose execution the petitioner was in custody at the time of the filing of the original petition, moved the commissioner to decline to take further jurisdiction in the case, on the ground that the Act of Congress already referred to, is unconstitutional and void in this, that it attempts to confer the judicial power of the United States, upon a judicial officer holding his office by other tenure than that of good behavior.

Mr. Sellers requests in view of this objection, that the further hearing of the case be postponed until Monday, February 2d, 1874, at 11 A. M., and that the proceedings be reported to the Circuit Court, for such instructions as they may decree meet.

Your commissioner, therefore, in accordance with said request, hereby submits the question to your Honorable Court for its decision thereon.

All of which is respectfully submitted by your comissioner, January 20th, 1874. CRAIG BIDDLE.

CADWALADER, J.

The question certified arises upon the concluding words of the Act of Congress, of 2d March, 1867, supplementary to the

several former acts abolishing imprisonment for debt. The former acts to be considered, are not only those of 28th February, 1839, and 14th January, 1841, "to abolish imprisonment for debt in certain cases," but also those of 6th January, 1800, and 7th January, 1824, "for the relief of persons imprisoned for debt." Those acts of 1800 and 1824, made certain functions exercisable by commissioners of insolvency, especially appointed for each case in which relief might be affordable. The intervening acts of 1839 and 1841, contain no such express provision. But their execution might have required the occasional intervention of such specially appointed commissioners. The words in question at foot of the supplementary Act of 1867, are, "But all such proceedings shall be had before some one of the commissioners appointed by the United States Circuit Court, to take bail and affidavits."

The objection certified, assuming that these words confer an independent judicial function upon such a commissioner, is that Congress cannot constitutionally make such a function exercisable by any officer who is not appointed by the President with the consent of the Senate. If the objection would otherwise prevail, the assumed construction of the words must, for that very reason, be rejected, and they must be understood as having a constitutional meaning and application. They might then be reasonably understood as importing that whatever proceedings before a commissioner, under this supplementary Act of 1867, or any former act, should thereafter be necessary or otherwise proper, they should be had before one of the standing commissioners. Legislative precedents for such an enactment might be mentioned. One of them occurred under the Bankrupt Law of 1800. By that act, § 2, commissioners of bankruptcy had been specially appointable, for every case, by the judge. The Act of 29th of April, 1802, to amend the judicial system, § 14, substituted general commissioners appointable by the President, without requiring any consent of the Senate.

It may be suggested that if such were the true and only application of the words in question, the present proceedings ought to have been commenced by a petition to the court, or to a judge;

and that the reference to one of the standing commissioners, if proper, ought to have followed. In future, this will probably be considered the more convenient course in ordinary cases. The present certificate of the commissioners having been made at the debtor's instance, may be so acted upon by the Court as to be of equivalent effect to an initial petition, and a reference under it.

But there may perhaps be extraordinary cases in which the exclusion of a standing commissioner's initial cognizance of the application for relief, would prevent seasonable liberation of a prisoner. We may, therefore, consider whether the constitutional question which has been suggested could then properly arise.

That Congress may vest the appointment of such an inferior judicial officer as the commissioner in the President alone, or in the Court alone, is, under the 2d section of the 2d Article of the Constitution, indisputable, and is not here disputed. The objection is, that the function here in question, is an independent one beyond the pale of an inferior officer's authority. But it is observable that the function is merely incidental to the execution of final judicial process. It is not necessary, however, to inquire whether Congress could make such a function exercisable independently of revision by the tribunal which issues the process, because under these Acts of Congress, the commissioner's proceedings are, at every stage of them, amenable to such revision.

His relation of a subordinate or inferior judicial functionary, if he proceeds without special preliminary authorization, may perhaps, warrant summary revision by the Court on affidavit, showing that his proceedings are unwarranted or irregular. If this be otherwise, it follows that there may be revision through process of habeas corpus or certiorari, if not by both.

The jurisdiction of the Court having already attached under the judgment and execution, the power to issue revisory and auxiliary process by habeas corpus or certiorari, is conferred by the 14th section of the Judiciary Act of 24th September, 1789. This enactment expressly names the former of these

writs, and the latter is included in the words, "All other writs not specially provided for by statute which may be necessary for the exercise of" the "respective jurisdictions and agreeable to the principles and usages of law." The point as to certiorari to enforce revision has been considered in another circuit; and has, in principle, been decided by the Supreme Court in the case of a mandamus. The Circuit Court has no original jurisdiction to issue a mandamus, and it is not named in the 14th section. But the decisions are, that it is, nevertheless, one of those other writs, which, in aid and furtherance of an execution, may under that section be issued by the Circuit Court.

In the present case, it will suffice to make an order directing the commissioner to proceed in like manner as if the petition had been presented in the first instance to the Court, and had been afterwards referred to him for provisional action, subject to exception, &c.; provided that the petitioner's right of liberation and every incidental and other question shall be open to consideration, and that either party may apply to the Court for directions, &c.

The nature of this proceeding would be misconceived if it were understood as affecting any other party than the execution creditor, or as depriving him of any recourse against the debtor, except that of imprisonment. No Federal Court can interfere with any independent process of a State Court. Nor can a State Court interfere with the execution of judicial or other process of a Federal Court. A discharge by the Insolvent Court of a State, therefore, has no force or effect of its own to liberate the insolvent from custody, under mesne or judicial process of this Court against his body. But under Acts of Congress ordinarily called the Process Acts, which have not been as yet cited, a rule or practice of a court of the United States that "under neither mesne, nor final process, shall any individual be kept in prison, who, under the insolvent law of the State, has for such demand, been released from imprisonment" was valid. This was not generally understood until the decision of Beers *v.* Houghton, 9 Peters, 329, in the year 1835. Such a rule or practice was afterwards adopted in the Courts

of the United States in most of the judicial districts, including those of Pennsylvania; and it was the purpose of some of the subsequent Acts of Congress which have been cited, to facilitate such discharge from imprisonment. It thus became the practice in this Court to discharge a prisoner as in the State courts, on his giving a bond with the usual condition to take the benefit of the insolvent law of the State at the next term, &c.

This insolvent law of the State authorizes the discharge of an insolvent debtor, on different conditions, in three different cases; the first where he is arrested or detained under process in any civil suit or proceeding for the recovery of money or damages, or for the non-performance of any decree or sentence for the payment of money; the second, where he is held on a bail-piece; the third, where he is not arrested, detained, or held in custody in any manner. A person arrested or detained in a civil suit, under mesne or final process of this court, or under a bail-piece issued in any suit in this court, cannot obtain his liberation from such custody by a proceeding of either the first or the second kind, in a State court of insolvency. Nor in a proceeding of the third kind will the State courts have cognizance of any ulterior purpose of such a party to make the discharge when obtained, available for his liberation in this court. The present petitioner is reported to have proceeded in the Insolvent Court of the State to obtain, not a general discharge in the third of these modes, but a special discharge from the process of this court in the first mode. Of course he failed to induce the exercise of such a jurisdiction: Leg. Int., 24 Oct., 1873, Vol. XXX., p. 344.

Whether his present application is rightly conceived, and, if not, whether the mistake will prevent him from obtaining relief under a simpler view of the legislation of Congress which may be applicable, are questions for preliminary consideration and provisional decision by the commissioner. One of the questions may possibly be whether the provision of the law of the State that a prisoner, such as this defendant, who was in custody under process upon a judgment in an action for deceit, shall not be discharged until after an actual confinement of sixty

days, qualifies the right of liberation, which would otherwise be available to him under the Acts of Congress of 1800 and 1824. If the right is thus qualified, it must be through the effect of the Acts of 1839, 1841 and 1867. These laws were enacted in the spirit of the decision of Beers *v.* Houghton, with a general purpose to enlarge exemption, and facilitate discharge from imprisonment. It is true, that in extending the relief to the full extent of that affordable under the laws of the respective States, these Acts of Congress require observance of the respective State laws, and expressly provide that all existing modifications, conditions and restrictions upon imprisonment for debt, under the laws of any State, shall be applicable to process of the courts of the United States therein, &c. But the question to be considered will be, whether these requirements and conditions are not limited to the cases in which this adoption of State laws by Congress gave exemption or relief not otherwise obtainable under any positive law of the United States; and therefore, whether the positive enactments of 1800 and 1824 in favor of personal liberty, are impliedly repealed or qualified by the subsequent statutes. I do not mean to intimate any present opinion as to their operation in these respects.

The Act of 1867 was passed on the same day as the present bankrupt law. The insolvent laws of the several States variously differed from one another, and provisions of some of them could not co-exist with the bankrupt law. But I do not perceive that the act in question is interpretable, in anywise, with reference to the bankrupt law. Nor do I perceive any important bearing, positive or negative, of any of the provisions of the 5th, 6th or 14th sections of the Act of June 1st, 1872, "to further the administration of justice," though the general purpose of its 5th section is to promote conformity in the practice and modes of proceeding in the State and the Federal courts. But here again what I suggest will not preclude future argument.

I make the suggestions because their subjects were more or less fully argued on the application of the execution creditor for a writ of prohibition to the commissioner, and because they serve to explain my reasons for not granting that writ.

DISTRICT COURT. FEBRUARY 21, 1874.

ADMIRALTY.

COLLINS *v.* THE BARQUE MARGARET.

1. Partial wages decreed where the relation of the men as mariners was not absolutely determined by desertion, although there had been great misconduct.

2. Jurisdiction as to a foreign vessel whose voyage was not determined is entertained with caution.

LIBEL for wages

CADWALADER, J.

The British Consul appears to have considered the case one of great misconduct on the part of the libellants, but not one in which the relation of these men as mariners was absolutely determined by desertion properly so called. On the other hand he did not consider them entitled to full wages, and he seems also to have thought the relation of mariners determined by absolute necessity, if not by tacit mutual consent of themselves and of the master.

Under such circumstances the wages were not wholly forfeited. I do not know what might have been decided by the Consul, if the captain had proceeded for the compulsory return of the mariners to the vessel, or for their transmission to a home port for punishment. Neither of these questions were submitted to the Consul. His report of what occurred before him shows that as an arbitrator his decision would have been that each libellant should receive no more than thirty-five dollars of the wages otherwise due to him.

It is on this footing only that I entertain the jurisdiction as to a foreign vessel whose voyage was not conventionally determined.

I accordingly decree $35.00 to each libellant without costs. This decree will not be entered unless the suits at law against the master are discontinued.

DISTRICT COURT. APRIL 20, 1874.

INTERNAL REVENUE.

UNITED STATES *v.* WHISKY, BRESLIN claimant on the claim of the administrator of WILLIAM HEILMAN, deceased.

The provisions of the Act of Congress of 13 July, 1866, giving moieties to informers in internal revenue cases were repealed by the Act of 6 June, 1872, and the latter Act provided that it should not be construed to affect . . . any right accrued . . . under former acts. The Act of 1866 declared that no right should accrue to the informer until payment of the proceeds of the forfeiture. The cause of the forfeiture arose prior to the Act of 1872. It was admitted that under the provisions of that act the informer had no claim to compensation; but his representatives contended that, notwithstanding the declaratory clause of the Act of 1866 he was entitled under that Act. The Court in adopting the views of their counsel, *Held*, that a *consequential* right, though *accruing subsequently*, was within the meaning of the saving clause of the Act of 1872.

THE statement in this case is by Judge Cadwalader.

STATEMENT.

By the 9th section of the Act of 13th July, 1866 (14 LL. U. S., p. 145), section 179 of the Act of 30th June, 1864, was amended by striking out all after the enacting clause, and inserting, in lieu thereof, certain enactments regulating prosecutions for the enforcement of forfeitures incurred in cases not otherwise provided for, and providing that, where not otherwise provided for, such share as the Secretary of the Treasury should by general regulations provide, not exceeding one moiety, nor more than $5,000 in any one case, should be to the use of the person to be ascertained by the Court which should have decreed the forfeiture, who should *first inform* of the cause, matter or thing whereby such forfeiture should have been incurred. And it was declared to be the true intent and meaning of this and all previous internal revenue acts granting shares to informers that "no right accrues to or is vested in any informer in any case until the forfeiture in such case is fixed by judgment or compromise, and the amount or proceeds shall have been paid,

when the informer shall become entitled to his legal share," &c. And it was provided that nothing therein contained should be construed to limit or affect the power of remitting the whole, or any portion of a forfeiture conferred on the Secretary of the Treasury, by existing laws. And the commissioner of internal revenue was authorized to compromise, under regulations to be prescribed by the Secretary of the Treasury, any case arising under the internal revenue laws, whether pending in court or otherwise.

The Act of 6th June, 1872, S. 39 (17 LL. U.S. pp. 256, 257), repeals so much of the former enactment "as provides for moieties to informers," and authorizes the commissioner of internal revenue with the approval of the Secretary of the Treasury, to pay such sums, not exceeding, in the aggregate, the amount appropriated therefor, "as may, in his judgment, be deemed necessary for *detecting* and bringing to trial and punishment, persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law"; and for this purpose $100,000 or so much thereof as might be necessary was thereby appropriated out of any money in the treasury not otherwise appropriated.

The 46th section of the same act (LL. p. 258) repeals all acts and parts of acts inconsistent with the provisions of the act; and provides as follows: "All the provisions of said act shall be in force for levying and collecting all taxes properly assessed or liable to be assessed, or accruing under the provisions of former acts, the right to which has already accrued or which may hereafter accrue under said acts, and for maintaining, continuing and enforcing liens, fines, penalties and forfeitures incurred under and by virtue thereof. And it is provided that this act shall not be construed to affect any act done *right accrued* or penalty incurred under former acts, but every *such right* is hereby saved; and all suits and prosecutions for acts already done in violation of any former act or acts of Congress relating to the subjects embraced in this act may be proceeded with in like manner as if this act had not been passed."

Under proceedings to enforce a forfeiture, incurred before the Act of 1872, which were commenced before that act, a judgment of condemnation was pronounced after the act. The *first informer* of the *cause whereby the forfeiture was incurred* claims the benefits of the enactment of 1866. There was no obstacle to the claim unless its allowance was precluded by the Act of 1872.

Mr. McMichael and Mr. Valentine for the United States admitted that no part of the sum appropriated by the 39th section of this act could be applied to a claim like the present; but contended that the repealing enactment of the section applied, and was not qualified by the 46th section, because the declaratory part of the enactment of 1866 had provided that no right should accrue to the informer until payment of the proceeds of the forfeiture.

Mr. Duffield and *Mr. Sypher,* for the informer, contended that his right was nevertheless saved by the 46th section of the Act of 1872. They insisted that where the forfeiture had been incurred before this act, a *consequential* right, though *accruing subsequently,* was saved by the express words of the section, if the right accrued under a provision of any former act. Here the right in question accrued under former acts, and was consequential upon a forfeiture incurred under them.

CADWALADER, J.

I think the argument of the counsel for the informer a sound one. But I have had some anxiety in pronouncing a decision because there is no appeal. The Pennsylvania Statute of 16th April, 1827, enabled the courts of the State to hear and determine all disputes about the distribution of moneys arising from executions and gave a right of appeal to the Supreme Court of the State; and the Act of Congress of 19th May, 1828, § 3, provided that writs of execution and the proceedings thereupon should be the same in the courts of the United States as were then in use in the courts of the respective States. Nevertheless the Supreme Court of the United States decided that it could not entertain a writ of error or an appeal from

a decree of the Circuit Court of this district making such distribution of the proceeds of an execution (Bayard *vs.* Lombard, 9 How. 530, and Sec. 15 Wallace, 682). The revisory jurisdiction, by appeal or writ of error, from the District to the Circuit Court, is regulated in like manner by acts of Congress on the subject; and the Act of 1st June, 1872, to further the administration of justice contains nothing more in the way of adoption of the course of procedure under the State laws than had been, for the present purpose, contained in the Act of 1828 above cited.

I have therefore suspended the decision until I should have an opportunity of consulting the Circuit Judge. After such consultation I am confirmed in the opinion which I had formed.

The claim therefore allowed.

CIRCUIT COURT. MAY 6, 1874.

INSURANCE.

LEWIS SNYDER, executor of the last will of Monroe Snyder *v.* THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

1. Evidence. Wills. Life Insurance. Nature of the doubt that should influence a jury and duty of the jury in reference thereto. Discrimination of facts relating to cause of death and motives therefor.

2. It is a question of fact for the jury whether an injury to the person of the insured received by him before making the application and not mentioned therein was serious. If serious, it amounts to concealment and will invalidate the policy.

COVENANT on policy of life insurance.

The action was by the executor of a testator who had caused his life to be insured for a large amount and whose death occurred under circumstances which gave rise to a reasonable suspicion of suicide, which, under the terms of the policy, would invalidate the policy.

The facts are fully detailed in the charge to the jury by—

CADWALADER, J.

On the morning of Saturday, the 22d of February, 1873, at about 7 o'clock, two men, driving a waggon across the Monocacy bridge, just at the entrance from the railroad station, towards Old Bethlehem, saw in the water of the Monocacy creek, as they crossed the bridge, something which they looked at, and discovered to be a dead body, and one of them had seen at just the same place a few weeks before, the dead body of another man, Lewis Conner, who was murdered as was reported, and it seems to have been assumed, in that neighborhood. They called and were heard by two or more of the neighbors, one of them the shoemaker, named Smith, and the other Mr. Leer, the gentleman whose testimony was given to you, and no doubt attracted considerable attention. Mr. Leer says that the sun was just rising, or had just risen at that time. The sun rises at 17 minutes before seven, 6.43, so that though one of the men in the waggon says it may have been after seven, the probability is that it was a little before seven o'clock. The body was left in the water until the arrival of the coroner from Allentown, some three hours or more later. In the meantime Mr. Leer and some other person, but especially Mr. Leer, had examined the place, on and under the bridge and the intervening space, and the neighboring space, of which the landmarks are no doubt fresh in your recollection. I need not go over the *minutiæ*, and the different points which have been so very clearly described by Mr. Leer, who has recently made a diagram, which you have seen, and explained it to the jury in sections and made his marks intelligible no doubt, to you, for he seems to be a calm and intelligent man. It is conceded to be impossible that the body could have been where it was found through any simple accident, without some effort of will of a human creature.

There is a difficulty which we will consider more particularly hereafter in comprehending how the body could have been where it was found without some other agency than that of the dead person in his lifetime. The stream had not force enough

to move it even if the fall had been in the water, but the weight of probability is that the fall was in a dry place, and not in this shallow stream. The body was from twenty to twenty-five feet, I think you will safely say, from the evidence, at least twenty-two feet from the nearest point which it could have reached from the bridge. As to the speculations, or perhaps that word is too lightly used, the alleged proofs from the footsteps and marks on the bridge and marks below, you know how to give due weight to them, and I cannot assist you in doing so, but the position of the body was one which hereafter we will have to recur to in order to determine by what agency, other than accident, which we cannot assume, it had reached the position where it was found. Now, it lay there until, as I said, sometime, which, according to the best evidence, I think must have been between ten and eleven o'clock, when a person, with the assistance of the coroner got it out upon the bank of the creek—the Monocacy—and there it was ascertained to be the body of Monroe Snyder, a citizen of good standing in Bethlehem, a man of whom the undisputed account is that at quarter past nine on the evening before he was in apparently good health and spirits. During this period of some thirteen hours, more or less, we have accounts which according to one side or other of the contestation of the parties, may refer to him until a short time after two o'clock, supposing him identified sufficiently by witnesses whose testimony we will have to consider hereafter. But from the time before three o'clock until the body was seen at seven o'clock, at least four hours, we have not even the obscurest evidence for ground by conjecture from any distinct fact. The moon, I may here remark, which was twenty-five days old, though half through with the last quarter, did not rise until seventeen minutes past three. There had been some stormy weather, some starlight, but the night was a dark one, and though they have gas in the borough of Bethlehem, they seem to put the gas out about nine o'clock, and the people go with lanterns, if I understand the evidence rightly. In this borough, of which I shall say something presently, for we must think a little about the character of the inhabitants

in order to understand this case, the lights appear to be extinguished at such a time as to assist the operations of thieves and other people. Though they have gas—we hear of it in the hotels—it is considered very late if they put it out there at twenty minutes past ten, so that the period when our bad town people are strolling about, is one of comparative darkness and obscurity in Bethlehem.

Now, then, when the body was examined, first cursorily, on the bank, and afterwards by surgeons in Fetter's Hotel, at about two o'clock, I believe, on the same day upon which it was found or discovered, there were four wounds, one a mortal wound on the head, from which it seems to be fairly agreed that he died from suffusion of blood upon the brain, caused by a severe blow. The other three wounds were from an instrument which the surgeons think was not sharp pointed, but of the knife kind. These three wounds were not mortal, that is to say, though they might have caused inflammation from which death would have ensued, that could not have occurred probably for days, but the earliest time is said to be eighteen hours, and that is much under the time that the other surgeons indicate. Probably for two or three days, if not much longer, these wounds which were not necessarily mortal, even then may not have caused death. The exact character of the wounds—these three wounds—which have been discussed by the counsel and extended as the testimony is from surgeons, we know very little of. They were on the belly, in the neighborhood of the navel, one a little above and the other below. and one moving upward and inward, and the other downward and inward, and the third not so distinctly described, and apparently more trifling. These three wounds appear to have been of about the same width at the bottom as at the place where the instrument inflicting them entered the body, and I do not think there is any reason to doubt, from the testimony, that one of them at least, had penetrated the peritoneum, but they were very shallow cuts and the measure of the little finger seems to be the greatest length attributed to them. They were very shallow cuts, and so shallow that the one which penetrated the peritoneum must have barely

penetrated it. The counsel for the defense contend that none of them entered or passed through the peritoneum; but I don't think that a just view of the evidence. The surgeons state positively (two or three of them) that it did, and the only supposed contradiction is the remark, as to which there is no dispute, one of them made to the principal surgeon, saying, "gentlemen, you see the peritoneum is not penetrated;" but Dr. Linderman says that it was so evident that that meant the omentum and not the peritoneum that it was not worth while to contradict or explain it; and two, if not three of the surgeons say positively the peritoneum was penetrated: Dr. Linderman saying he is positive that it was.

Now, that has been considered very important by counsel on both sides, but you must not take my impressions of the evidence for this. That has been considered very important by the counsel on both sides, because the surgeons say that no blood was found in the abdominal cavity, but it is agreed by surgeons on both sides that if the peritoneum was penetrated there would have been blood in the abdominal cavity; but, gentlemen, the lamest possible *post mortem* examination that could have been made, this appears to have been. They took it for granted that it was murder at that time, and perhaps it may not be wholly unimportant in that stage of the cause that they did, but I am not now discussing that they all took it for granted that it had been a murder. No idea of suicide then entered anybody's mind, and this remarkable fact is undisputed that when they stripped the body to examine these wounds, they put the inner red shirt, the outer white shirt, and the drawers under the head, which they laid open, so as to saturate them with blood. That occurred almost immediately after the examination, and after that of course no inspection of the clothing would help us.

Now, it is agreed by counsel as to the whole of the evidence, that there was a red discoloration of the white shirt, and one of the surgeons said it was red for the length of his little finger. The red shirt would of course have absorbed in the first instance the blood. Dr. Atlee tells us that there are no large blood ves-

sels there, and though he speaks of a tablespoonful of blood as if it were very little, I am not sure, gentlemen, that we will all think it is very little. But by that estimate the body had been in the water for four hours, probably at least, because it was stiff. I don't mean, however, to lay that down as a fact. It had been some time in the water; it was stiff; the water was very cold, and on the whole it is not surprising that in this cursory way that but one blood spot only was seen, and that the clothing having been under the bloody head in the subsequent examination, would be useless for us under a microscope, which would have been otherwise very useful, and would have been of no use at all under these circumstances. I think that neither party has a right to argue with any certainty about that. Still, it is for you, gentlemen, to say. Counsel for plaintiff and the witnesses have a theory of the case, that these wounds must have been inflicted after death, because there was no blood, or so little blood. Well, gentlemen, you will give such weight as you may think attributable to that argument, though that is not properly called an argument, but to the fact. It seems to me that the whole of this business was careless; but I cannot blame anybody for it, because they none of them until afterwards saw the importance of it. It seems that this was all done so carelessly that an argument about or theory of blood or no blood, would be very unsafe. It is true that if the attention of the surgeons was really given with the attention that we now might think it deserved on account of the importance of it, to the question of blood in the abdominal cavity, then the absence of such blood would be very important, and would seem to indicate that the wounds were inflicted after death. You will consider that part of the case for what it may be worth, and I will ask your attention to what strikes me as much more important, and that is the character of the wounds themselves.

Now, gentlemen, it is very unsafe here, even to argue about probabilities, the most improbable things are sometimes true, and the most probable things sometimes don't happen, but if you go for mere probabilities, if the murderer stabbed this body after death, it is very strange he did not cut deeper; if, on the contrary

the wounds were inflicted during life, either by the murderer or by a suicide, there is no difficulty in finding just such little wounds as these. If a man stabs himself he will very likely shrink from cutting deep, and if a man stabs another man he must do as best he can, and though the counsel put themselves in a fencing rather than a forensic attitude in discussing the question, it would be arbitrary to adopt any conclusion of probability except in the event of death, but if death had occurred before these wounds, you will say whether it will be very probable that the murderer would not have struck more deeply into his victim.

Now, these are the external aspects of the case as it was exhibited at the coroner's inquest on *post mortem* examination. Whatever may have been thought then, and we don't know, and I do not see that we need care, there was further investigation, supposed or actual further developments, and there arose a very natural difference of opinion whether this death had occurred through murder or suicide, the theory of accident not seeming to be adopted by anybody, and I don't think, being reasonable. How the body got where it was seems to have been a matter of immediate attention and of continued thought and observation, and what motives were attributable to the deceased man in cases of imputed suicide, was also a matter of considerable thought. It is not surprising that conflicting opinions arose in the community, even if it had been a larger one, and there seems to have been a difference very soon arising. I say that because some of the witnesses appear to have had a theory on one side or the other of the question. A difference of opinion naturally arose, I say, whether this was murder or suicide.

Now this deceased person, Monroe Snyder, had effected certain insurances, on three of which, for the sum of $30,000, this action is brought. It is admitted that the insurance was made. It is admitted that the premiums were paid, or what is equivalent, accepted. It is admitted that the man died on the day in question. It is admitted that due proof of death was made, and the admission is such as to dispense with the exhibition of

the proof, and all these admissions are made in what are technically called the pleadings, that is to say the written declarations of the plaintiff and the defendants. The insurance company allege that the insured died by his own act, and the policy by its express terms is null and void if he died by his own act or hand, whether sane or insane and the defendants ask me to give you instruction in a point of law that each of the policies sued on was issued to and accepted by the insured, with the express condition and agreement that if the insured died by his own act or hand, whether sane or insane, then the policies should be null and void, and I am asked to say to you that if you believe on the testimony that Monroe Snyder died by his own act or hand then the plaintiff cannot recover anything for any of the policies except the premiums paid upon the policies, to wit, a certain sum of money.

I affirm that proposition, and give you the instruction as requested.

It is admitted that the defendants have assumed and taken on themselves the burden of proving that theory to your reasonable satisfaction, that this man died by his own act or hand—in other words, that the death was caused by suicide, and the question or questions whether the evidence is incompatible with the contention on either side—on one that it was suicide, and on the other side that it was murder. If the evidence is incompatible with one and compatible with the other theory, of course your verdict will be found without difficulty, if you reach that conclusion. But it is difficult to find any such simple view of the case, justly, and it becomes necessary to weigh opposing theories one against the other. Then you are to make an effort of reason to assume the different contingencies that are to be considered to say how one or the other is compatible, or more compatible with murder or with suicide, what the difficulties are of adopting the opposing theory, and in doing so, gentlemen, you are not (I undertake to give you advice in a matter justly not mine), to get rid of your duty by sheltering yourselves behind a doubt. There should be a plain, manly effort to resolve doubts, and when a doubt is once resolved, as I have often

said in this court, it is no longer a doubt. It is our duty to grapple with doubts, and to resolve them if we can, and not say, oh, that is a doubt, and I will find it in a particular way, and get rid of all difficulty, and a solemn duty. You will have to grapple with several in this case, gentlemen; try to resolve doubts to the best of your ability. If finally you cannot resolve doubts, and the case is so obscure that it cannot be cleared up, then you may at last consider on whom the burden of proof lies, and if there is a failure of that party to relieve themselves of the burden of proof, then it may become your duty to find a verdict upon that ground, but it is the very last standard of duty which ought to govern your consciences.

Gentlemen, I don't see how, as I said before, we can rightly consider this case without transplanting ourselves to this borough of Bethlehem, inquiring or considering the local usages and the habits of the inhabitants. The insured is described in the policies as a retired merchant. We have no account of his business before 1866, when he had an agency for a Slate company, and since that time we have some evidence of how he was engaged, and it is reasonable from the description of him in the policy, and the other evidence to assume that he had some years before retired with what may then have been supposed a competency, and what was a competency a few years before 1866 is a very different measure for the present time, and I suppose there is no place in which the standard has changed more than in Bethlehem. In 1832, according to gazetteers, there were 800 inhabitants; in 1843 there were about 1600; in 1845 the borough was incorporated, and then I suppose it had a population of less than 2000. According to the census of 1870, if we are to rely upon it, there were in Old Bethlehem 4500, in South Bethlehem over 3500, in Old South Bethlehem and West Bethlehem about 900, and in the other dependencies of Perryville and the outside limits of the south borough there lived some four or five hundred, so that from 1845, in twenty-five years, the population had increased from 2000 to 9600; probably at the time of the occurrence in question, it may have been about 10,000. In the meantime there was the wealth of

the railway and the new population mixing with the old, and the quiet walks of the creek and river turned into bustling commerce, and the new population commingling with the old, the increase in the expense of living being very great.

Now, if Monroe Snyder retired before the civil war with his competency, say a dwelling house with a stable and a one horse carriage—large double dwelling house—able to fit his son out in the neighboring apothecary establishment, and perhaps worth, if clear of incumbrances, 16,000 or more dollars, as it is alleged, with what investments we do not know, he might have been living very comfortably, and have found a sad change when the expenses of living were doubled; and it is not surprising, if the increase of expenditures was leading to a gradual diminution of capital and income, that this gentleman should have resorted to speculation to make up the deficiency, and in a letter of confidential writing to his son which he left behind him, and which I shall quote often as I proceed, he says to the son: "You know that I always tried to do the best I could, but oftentimes where I thought I could make something I lost." He seems to have, in other words, entered into speculation. He appears to have been a kind-hearted man, irresolute and easily influenced by others; the same letter shows that. He says: "Don't do as I have done; don't let people talk you into anything, to go security, or indorse notes to the banks, and all sorts of such things." Then he says: "Whatever you do, don't let people belie you, or lie you into things as they did me."

I suppose he means lie you into speculations; that is my judgment of the meaning from what he says. "Do the best you can, but never go security for anybody, nor ever indorse a note for no man, no matter who he is. If you manage right you can get along without asking anybody to go security for you, or to indorse for you." Then he warns him against speculating in corporation stocks: "Keep out of these companies, for it is worth nothing to be in these large companies. Be very careful that you don't get cheated so much, and don't let people take you into all these things." Then again: "If anything should happen to me sell my interest in all those iron mines or

ore leases, it is too expensive and very risky business, and don't listen to what other people tell you, and tend well to your store." Then he says again: "Stay out of these companies; never go in a company of no kind, for it is worth nothing to be in these companies, but you are old enough to look a little ahead, and don't spend much money on them iron ore leases; if you can get a little something for them, sell, and if not, let them run out, and don't spend much money on them, for it's very risky business—lottery business, as Mr. Jacob Herstand said." There is a good old German name, gentlemen. Then he says: "So now Lewis keep out of these things, as I told you often." That passage struck me. It seems that he had then had such conversations with his son. "As I told you often; because it is worth nothing; this mining is very risky business; don't spend any money on them leases what I hold, if you can get anything for them, sell them, if not, let them run out, particularly the one at David McCrea, where Tinsman is interested, for I don't think he is much better than Lynn, and Coffin is about the same, and if you are a partner, you are in for the debts if she makes any." This writing corroborating all. He remarks: "I will try and get you out of all these things, and stay out. If I do something I will do it alone hereafter."

Now, as to Slate companies, he did not seem to have a much better opinion, and even those he seems to have misgivings about. He says: "The best way I think is to sell everything after I am gone as soon as you can get the money out of the insurance companies, for that matter about the St. Nicholas Slate Company and others might make you trouble, where I am security, if the property is not sold."

Then he says: "Don't give up Shoemaker's Slate stock certificates, what I hold as collateral security until he has settled all his notes, what I have endorsed for him."

Now, gentlemen, I have read these passages because they give you a sort of biography or history of this man, and the ordinary result appears, I think, in the inventory of the estate after his death, that his available funds had been diminishing, while his speculative investments were increasing.

He says: "If I could," this is the ordinary result, I think, what I am about to read, of speculation to retrieve diminished capital and income. He says: "If I could turn things into money what I would like to sell I could shift it around, but there is no sale for nothing at present." And you observe he was trying to get rid of his slate stock, and you can apply these remarks and see the limited amount of property in the inventory which was exhibited after his death, and he says what you might infer. "Lewis, I have more debts than you know, or than you think, but I can't help it; you know that I always tried to do the best I could, but oftentimes where I thought I could make something, I lost. I often thought I would tell you more about my circumstances than I did, but when I meant to tell you I could not do it, and if I would it would not make it any better. If I could turn things into money what I would like to sell, I could shift it round, but there is no sale for nothing at present."

Thus he was going behindhand unless he could make profits out of these speculations, at least it is not for me but for you to say whether that is the proper meaning of the letter. In the meantime what had he done? He had insured his life, and he says of that, and he writes I think like a simple-hearted, natural man. He says: "I am insured too much; it costs me too much money to keep it up, or to pay the premiums, but I am in now, I will keep it up if I can." He says for that purpose, that is to pay the debts, "I insured so much that all my debts can be paid."

Now, gentlemen, this was not after the old fashion of Bethlehem, it was incongruous to the locality, and with the olden time, and it was entirely incongruous with the educational opinions or feelings, if I might so state, of the deceased man himself. There are some curious traits of the old German, hard money, economical feeling, which he would have liked to have made the rule of his conduct, and I will remind you of what no doubt attracted your attention. He had a safe, as you recollect, it has often been referred to. Now, in that safe, it appears that there was money which he had put apart, belong-

ing to two deceased children. One of them, William, had been killed on the railroad, near Gettysburg, some nine or ten years before; another, a daughter, had died we don't know exactly when, and he had one surviving child. Now in that safe was the money of these dead children, and what he calls the money of the living son, in coin, which was the right sort of money, such as you have in the German counties in the stockings of the old women, and in the cupboards, shot-bags, and so on. That is money, not the bank notes, or mortgages, that is not money; but this coin amounted to the wonderful sum of two hundred and something dollars. There was gold $115, silver, $91.33=$206.33, and the safe was worth $40, and here was a gentleman whose debts and assets are discussed by units of ten thousand dollars by counsel, and 20, 30 and 60 thousand dollars of insurance, and so forth.

Now, he writes to his son Lewis: "Keep that safe and the gold and silver money what is in the safe; keep that without fail." Then he repeats: "Don't let that safe go to strangers, keep that, and keep the silver and gold money which is in it—the $206. If you don't keep the money that there is in it—the silver and gold—don't say anything to anybody, that is some of grandpap's yet, and William and Amanda (that is the son and daughter) had some when they died; that is in the safe yet, and yours too, what you have for a good many years." That is the son he had set up in business. "Keep all that, and don't let mother give all her money if I am gone, so that she has something to live. If the insurance is all paid you can get along right well, and I can see no reason why they won't be paid, for the premium is all paid on the policy, and the companies are all good companies. Don't let that safe go to strangers, keep that, keep the silver and gold money what is in it."

Now, gentlemen, there is another thing showing the old-fashioned way of this man, as he probably was when he became a retired merchant, expecting it to be enough for his old age. His son, you recollect, he set up in business, at least that is the fair inference from the evidence.

Now, as I understand the passage in this letter, when that son was able to pay to the father the advance, he paid it, and the father gave him a receipt for it, and the father, expecting to die insolvent unless his affairs, were retrieved, referred to that transaction in this letter. He was afraid the creditors might consider it a defence, and he refers the son to the receipt. He says: "You will also find a receipt for your stock in the drug store, so you can hold that; perhaps my creditors might try to get hold of it; that shows that you paid me for it."

Now, I read that naturally, not as anything wrong, or as anything that the creditors would have a right to take hold of, but as what the creditors might, through mistake, think that they had a right to take hold of, and he says: "You have paid me for it and there is the receipt."

So here was this old-fashioned, hard money man, who kept his son in good habits of not squandering advances, but keeping to quaint, economical ways while he was making money, found himself involved in a vortex of speculation, and what was to his good old German notions an awful state of things to contend with. That is the way I look at his condition. It is for you to say whether it is correct. It may not have been so bad. It is very probable that his condition was not anything like as bad as he thought, if the arguments of counsel and the evidence are correct, but as he looked at it it was embarrassing.

The counsel for the plaintiff on the contrary say that this only meant that he was afraid that the property would be sacrificed, and that then the life insurance would be necessary to prevent it, and so forth. The jury will say.

Now, we have had this deceased man's character assailed most violently on one side, and praised most emphatically and eloquently on the other side. I rather think the arguments are about equally mistaken, gentlemen, and that like most human beings he had his faults; they may have been very great faults; and like most human beings he had his good qualities, and that the good qualities were commendable, and the faults and the weaknesses were to be viewed with indulgence so far as he was concerned, and with rigidity for the sake of justice so

far as others are concerned, and that is the view we have to take, or that ought to be taken of most of us after we are dead, and it doesn't do to assail a man because his standard is not in one respect that of the highest, nor to praise him to the skies in other respects. He seems to have had an unassailable point of self-respect, if we are to judge of the memorials he has left behind. It is a very remarkable reference to the person who seems to have been a brother-in-law, a mother-in-law, or kinsman on the mother's side, probably a brother-in-law of Henry Biel. The latter speaks of the grandmother Biel, but you will observe that he speaks of the son as if it was the son's mother, and not as if it was the writer's mother he probably refers to, and this could have been some near relation on the mother-in-law's side. It seems that Henry Biel had received Slate stock from him and probably paid for it more than the present market value. He says in his letter, as it is called, this confidential paper to his son, he says: "If Henry Biel ever asks you to take that Slate stock back, what he got of me, don't you do it, or pay him any money; don't give him a cent, for he can't make you pay, perhaps he will never ask you, don't know as he will, I would not do it." Now he had the kindest feelings for this Henry Biel. He says: "He would pay a good price to buy the real estate." He says: "He is a hard man to talk when he thinks things are wrong." There was no unfriendliness between them.

Then he had another matter in charge for which he was very much to blame, but that is not the question under trial here. He had used what at the time probably was not a large amount, the money of three young women of whom he was guardian; he had kept the accounts carefully and we have every reason to believe faithfully as to the mere writings, and they were in the safe, showing exactly what he owed, but he had used the money and he was technically in the relation of a defaulter—counsel say he was morally in a worse relation—but as I stated, we are not trying him for that.

Now he had a strong desire to see justice done to these people. The amount of his deficiency we know exactly. For Owen

Biel's child, as he calls her, he was, with interest, $2,303.89 in arrears, and for Lewis Berkenstock's two little girls, $945.93, making say $3,249.82.

He says now in this letter, "about grandmother Biel's estate, see that it comes all right, so that Daniel and Reigel, who are my security, need not pay anything for me."

Then he says again: "This guardian thing you also must settle, but Owen Biel's child I am guardian for, and for Lewis Berkenstock's two little girls. If I am not here any more they will get other guardians, but don't go guardian for nobody, it only makes trouble, but see that these things all come right; the books and papers about this guardian business are all in the safe; they show everything how it is."

Then he says again: "Only see that grandmother Biel's estate is settled up right, so that they can't say that they did not get their money, and if the security have to pay anything, I think Daniel is pretty severe if he gets mad once at anybody."

Then, again, gentlemen, there is what I think deserves attention, he had no doubt stated in these policies, there is some evidence of it I think in the letter, and he had observed on this probably as of more importance in another relation than appears yet. He observed in these policies that the money was payable, for he had so made it, to his son and his wife respectively. You recollect the form of the policy. Now, he seems to have been afraid these creditors would not get that money from the form of the insurance, and this was a thing that he did not mean to permit, if he could help it. He meant that these insurances should go first to pay his debts; that is part of the case; that is of two-fold importance, not merely for the introductory purpose I am citing it for now, but for an arbitrary purpose.

He says: "Pay all my debts, for I borrowed some money to pay the premiums on the insurance, so that my creditors could perhaps get a hold of insurance, and if they could not, pay all my debts and be a man, so that nobody can say that they lost money on your father. You can pay all my debts and hold all the property if you can get the money out of the insurance companies, and have money left. But when you get the money out

of the insurance companies, if it should ever happen so, don't think you would keep the money and not pay the debts."

Now, gentlemen, this was the man and such were his ordinary relations, and I do not think that we can do our duty to this case without in some measure looking at these considerations.

Now we come more nearly to the question of suicide, gentlemen. A popular writer of fiction of the present day writes flippantly of an embarrassed gentleman impressed with the necessity of making some provision for his family, who is seriously revolving in his mind a little commercial experiment of insuring his life and then falling from the top of a monument by accident.

Now, this case was, I think, on one side of it treated as if it might be regarded as a case of this kind. It strikes me very differently—I don't mean to say that the man did not contemplate suicide, but not at the time and in the manner imputed to him.

Let us look carefully at this case and see whether if he meditated suicide, he meditated it at the time and in the manner imputed to him.

The case as opened by the defendants was that the deceased made the insurance with the view to suicide. That was how the case opened, that he made the insurance with the premeditation to commit suicide. I think the evidence refutes that wholly. In the first place that I don't think so much of, for the insurance agents disprove it as far as they can. They say they forced this insurance on him, that they tempted him to it—these are not their words but the substance of what they testified—that they accommodated him in order to increase the amounts and if they had not approached him he would not have insured as much as he did, but he appears to have driven a close bargain with them, and have required a temptation of an abatement of $25 from some $500 more or less of premium, and to have had an indulgence offered by taking notes. He seems to have required quarterly instead of annual payments, and especially the two insurance agents certainly say that as a general matter they pressed the subject on him, and that he

generally was reluctant, but I think we have much more conclusive evidence than that. We have to take, gentlemen, this letter or confidential paper as a whole; if it is used against him it must be used for him.

Now, you will recollect, gentlemen, that he in this paper enjoined particularly on his son to take no advantage of the form of the insurance in order to avoid the payment of the debts, but to be a man and pay them.

Now, the last of these insurances is made payable to the wife. What does that mean? Did he then contemplate suicide with a view to pay his debts, and afterwards his family? Let me be understood. This paper was written, the whole of it, after the 13th of January, when the last insurance was made, that is evident from its contents, how it came after we don't know, except that it was finished the day before he died. Now, after the 13th of January, when the last insurance was effected, he wakes up to this firm conviction that his creditors would not get this money; did he wish that? On the contrary he takes every measure that a man can that his creditors may get the money. He therefore would have made that last policy, not in the name of his wife, not even in the name of his son, but he would have made it in his own name, that his creditors would have got it.

Now, I do not know whether you agree with me, gentlemen, but I don't think it is fair to take that last letter of his and tear it up, and spit on it, to use a vulgar expression. He says in that that the insurances were for his creditors, not for his family. If he had meditated suicide when he wrote that letter and made those policies, the money would have been payable so that his executors could have got it for the creditors, at least so it strikes me; you will say for yourselves; but I think this important only for this reason, for the sake of truth. It is, for the decision of the case, of no importance, whether he afterwards conceived the idea of suicide or entertained it when the insurance was effected. It is the same thing in the legal result: but it is important that we should get at the truth by whatever means, because otherwise, if we get upon the path by untruthful means, we get off

the track, and don't know where we shall lose ourselves, and for that reason I have thought it my duty in this painful case to do justice to this man's memory, for he has an awful account of debts to settle, and in this respect I think injustice has been done him, and that there is not the least ground to impute to him an intention to take his life when he made the last of these insurances, but, as I said before, that is not, I think, the question. The true question is whether, after that last policy was effected, this man, considering the desperate condition of his affairs if he lived and the favorable condition to his family if the insurances were received by them, did not conceive, but meditate with more or less of resolution, the thought of taking his own life. If that is made a subject of serious inquiry, and I think, gentlemen, that it is; if you go into probabilities much more probable than when this simple-hearted man, as I think he seems to have been, found himself in this vortex of difficulties, and not able to look his affairs in the face, when he saw that he had the insurance to this large amount, that the thought or temptation, or whatever it may be called, may have come into his mind, and that is the inquiry which we must approach with candid and serious thought.

Now here the evidence is two-fold.

First—The letter, and

Secondly—The occurrences which immediately preceded and followed it.

When I say immediately preceded, I say immediately preceded the last stage of it.

Gentlemen of the jury, this paper is not, independently of its particular contents, of an extraordinary kind, as I can see, at all. I mean to say that there is nothing surprising in a man leaving confidential directions to his only son and heir as to what shall be done after he is dead; the sort of directions that are not to go into a will. I suppose there are few men in this courtroom and probably few on the jury, who have not had large experience of such papers; men give special directions which don't concern the world at large. I am not now speaking of this paper in particular, I'm only speaking of

the character of such documents. They arise in various grades, from the lady's directions about her jewelry or her clothing, to the king's notion that he can make a will about his crown, which the law in this country doesn't allow them to make, but such papers are left behind by deceased persons, and lawyers are embarrassed constantly with a most knotty difficulty which most frequently occurs, whether such a paper is testamentary or not. Now, for instance, suppose a question whether these policies were liable for debts. If the man had any control, and this writing was testamentary, it might bear on the question. I don't say it would in this case. I don't say, as a lawyer, it would, but I am saying what a man, not a lawyer, might come and ask a lawyer about. These are among the most difficult questions that lawyers have to meet, as to whether such post mortuary documents are testamentary or not. That is to say, whether they must be proved as such, or may be kept as confidential papers. There is nothing in a direction to keep such a paper secret, unless the confidence. I am not speaking of the usage of writing to others, that is a different question altogether, but from the nature of the document that a man should leave a confidential paper to his widow or his son and heir, and it was not to be proved as a part of the will, that he should tell the son and heir that it was a confidential, private paper, that he was not to show to anybody, and that the son and heir on reading the first page and finding it related to property, might have kept the rest until after the will. There is nothing extraordinary in all that that I can see, but, gentlemen, in order to get rid of the prejudice that ought not to attach to the subject, I have made these remarks, because I don't mean to say that the paper is one which you can get rid of in this way, but I do wish a just and proper and unprejudiced introduction to it.

Now, there are two views of this paper, called a letter. One is, that it was a post mortuary, confidential communication to the son and heir; the other, that it was a letter of one contemplating suicide, and there is a third view, perhaps, that it was partly each, and that it was the production of a man who, though he contemplated suicide, was irresolute in writing it, and after-

wards as to executing the purpose. He certainly speaks in this paper of what he was to do if he were to live and go on in the world. He certainly speaks in other parts of it that he was to go out of the world very soon with violence. It is, it seems to me, a paper of a man who seems to be vacillating between contending purposes.

Now, the parts which I have heretofore read of this paper, are principally, if not altogether, consistent with it in one sense, for they bear on the question of insolvency, you will recollect; then I shall not repeat them, therefore you will bear that in mind.

Now, of the parts which I have not read, there are, we may say, two divisions. One of matter apparently quite innocent, and the other of matter which seems to indicate a purpose to take his own life, whether a definite resolution, or an indefinite or undefined one, will be for you to consider if it becomes important.

You have looked, at my request, in the early stage of this case, at the signatures of the three stages of this paper. It is, I think, both from the contents of the papers themselves and from one of the signatures—there are three places where it is signed —evident that this paper was written at intervals.

When the first stage of it was penned nobody can conjecture, except we all know it was after the 13th of January. Of that fact there can be no doubt. We also know the last of it was finished either on the night of the 20th of February or the morning of the 21st. That we know, but as to when the intervening parts were written, and what is the interval between them, there is nobody, it seems, to aid us in the least—counsel cannot help me—it is all conjecture when it was begun, except that it was begun after the 13th of January.

Well, now, as I said before, there are a great many matters, any of which are only material on the question of insolvency. Most of them I read. There are others, because I do not want to leave any part of this paper unconsidered.

He says: "Lewis, if God calls me away," which we all understand in German phrase to heaven, "If God calls me home

and away from you and mother, you must do the best you can. First of all, be kind to mother, and whatever you do, see that she is well cared for."

Very proper for a letter for his son, gentlemen, after death.

Then he says: "Keep all the property for the present time, if I should be called off, for in course of time the property here will bring a good price. I made you my executor in my will. If anything happens with me you must take my will to Easton to the Register's office inside of thirty days of my death, and take out your papers as executor of my estate. The men that signed the will as witnesses you must take to Easton to testify to the will. You don't need to give security as executor. You can take an inventory or an appraisement of my things, and before you have to keep a sale, you can see whether you get the money of the insurance companies or not."

That passage about insurance companies I mention in another connection afterwards.

Then he says: "About keeping the insurance policies up, you can do as you please or as you think best."

Then he says: "Lewis, I think I told you the Penn Mutual Life Insurance Company holds a mortgage of $5000 on our house, for which they hold one of my insurance policies for $5000 as collateral security. I have the paper in the safe which shows it, and the receipts that I paid the premium on it; they also hold the fire insurance policy as collateral security. which is transferred to them. You must see that it comes all right. Jonas Snyder holds the fire insurance policy on the drug store building as collateral security for Mr. Taylor's mortgage. That policy is not transferred. I have a receipt in the safe from Jonas Snyder. Lawyer Stout, at Easton, is the agent for the fire insurance company where the drug store property is insured in. Mrs. Reeder, at Easton, holds the insurance policy on your stock as collateral security for the thousand dollars what Shoemaker had loaned of her. Lawyer Reeder attends to her business. so that you can find everything, and try to straighten it up, for God's sake."

"Lewis, I think"—one of these is in the first stage, the

other in the second stage—now I come to what occurs in the third stage, "Lewis, I think it would be best if something should happen with me if you would get everything appraised and sell it."

Here you will observe, gentlemen, what I am about to read; you will observe that it shows that he changed his purpose. When he wrote the first of these three parts he thought they would keep the property and pay the debts out of the policies.

He, in the third stage, the third division of the third part, changed his mind, and thinking things not likely to be quite as favorable as he thought at first, he thinks they had better sell, and he says:

"Lewis, I think it would be best if something should happen with me if you would get everything appraised and sell it. Mother can take at the appraisement what she wants, and anything of the personal property you want you can buy, but the houses or real estate you can't buy, because you are my executor; you can't give a deed to yourself, but mother can buy the real estate or get a good friend to buy it for her, and she can take the deeds, and afterwards give you another deed."

Then again he says: "Lewis, you know how it is with the waggons, that one of them belongs to you, which one you want, and the sleigh, wolf robe and blanket, and bells are also yours; it was bought for you and you must keep it. You will also find a receipt for your stock in the drug store, so that you can hold that; perhaps my creditors might try to get a hold of it, but I don't see how they can, if you have this receipt; that shows that you paid me for it. * * * If mother ever gets money of the insurance companies, if she lives longer than I do, you must take care of it, for she can't, and don't let her lend out unless you see it. If you put it in a good national bank, I think that is the safest, or take the first mortgage on real estate."

Then, gentlemen, he goes on: "Lewis, I settled up everything with Lynn, he is to pay everything we owe over in Jersey."

Then he describes his first settlement, and he closes up with Lynn over again.

"If anything should happen with me, I hope it won't, but we don't know, for life is uncertain, but death is certain, Lynn must pay everything what I owe in Jersey for lumber and work, and for hauling the ore, and Kline's royalty and Kline's timber, and everything, before he can get them notes what he left me as collateral security. I also gave him that lease there at Kline's what I had on Henry R. Keuntz's land, otherwise I could not settle with him."

Now, gentlemen, I have detained you with this apparently prosing reading over these passages, because I have desired to keep together what is, as far as the subject goes, just what the man might write confidentially without any unfavorable imputation, but the paper unfortunately contains a great deal more, and I will ask now your attention to the parts of it which seem to import or may be contended to import that he intended or expected or contemplated an early and violent death.

The heads of the argument on this subject are several, one that in which concealment is enjoined. Now, gentlemen, this, I repeat, is unimportant, unless it is made out that there is something to conceal. Merely directions to the son that this paper was not to be exhibited unless there is something in it which gives effect to that direction, I have said, would be dealing very unfairly with what men leave behind them for their families. There are, however, I observe, as I shall read presently those parts of the letter, frequent expressions of apprehension of death, early death. There is also an indication of doubt as to getting money from the insurance companies. There is also an indication of an early time of anticipated settlement of dependencies, but that is fully answered by other passages which look to the future as though he was going to live.

Now, with this long preface, I will read and comment upon the remaining part of the paper.

"Lewis, sometimes I feel, and it appears to me that I won't be here with you and mother in this world long any more, but we don't know what God will let happen with us, but we have to submit. I don't hope to get killed or die soon, but sometimes I

feel and think that I would not be in this world long any more. Lewis, if God calls me home or away from you and mother, you must do the best you can. First of all, be kind to mother, whatever you do, and see that she is well cared for."

The word "hope" has been commented upon and explained as in this man's natural language, and his family appears to have been German; they seem to have spoken German as far as we can learn, and the word "hope" in the German *parlance* is said to mean nothing more than "expect." Counsel argues that in one place he says "I do not hope or expect to die soon," and therefore he meant something more than expect when he said "hope."

Well, gentlemen, I say if it was a legal writing, a deed, or an act of Congress, or any solemn paper for the purpose of business, I do not know whether that argument might not have something in it. But for a Pennsylvania German letter to be criticised in that way appears to me to be impossible. You may as well say that by the words "covered carriage" he meant two things, I should think. I do not understand the word "hope" so. You will say what meaning you attribute to it, but it is not to be expected that he would write such a letter that his son would understand that he meant to commit suicide. It would be couched at least so that that would not be exhibited in it.

Then he says what is more important: "Lewis, I have my life insured for $65,000 altogether; for $20,000 in the Penn Mutual Life Insurance Company of Philadelphia, and for $30,000 in the Mutual Life Insurance Company of New York, and for $10,000 I have an accidental policy in the Hartford Company of Connecticut, and $5,000 in the Mutual Protection Life Insurance Company of Philadelphia, which is for the benefit of mother. $5,000 in the Penn Mutual is for mother and $10,000 in the Mutual Life of New York is for mother. All my other insurance is for your benefit. If anything should happen with me, Lewis, get the money out of the insurance companies, for they have to pay it. The agents of the companies I insured in will assist you."

Now, there is nothing surprising or evil in his telling his son that he had effected this insurance, and that the son must get the money; but the manner in which the subject is recurred to afterwards is important, and the passage I have read is perhaps in one respect very important, but that is more for your consideration than for mine. He refers to the whole of the insurance as amounting to $65,000 which he looks to as a fund for the payment of his debts. Now, he includes in that $15,000 as I understand it, or $10,000 as it is admitted, of insurance against accidents. If he did not contemplate a violent death would he have reasonably considered that as a part of the available funds of his estate?

Now, gentlemen, I don't want to put that as a hair-splitting remark from a lawyer, as it may be regarded, but I want you to look at it as a matter of common sense; would a man who would look to something out of the common course as the cause of death speak of an insurance against accidents in the same category with the insurance that must be paid at all events, and sum them up as one whole as a fund to pay his debts with? The answer to it, however, is that there was enough without the policy against accident. But is that a satisfactory answer? Doesn't it still remain that whether there was enough or not he looked upon it as a fund to come into the hands of his executors? It is for you as a matter of common sense to say how it strikes you, and you will take it for what it is worth. I have not been quite satisfied with the explanation of it, but you may be. "Lewis, don't show this paper to anybody, whatever you do don't let any person see it; keep it entirely a secret. If anything should happen with me, sell my interest in all those iron mine or ore leases, it is too expensive and very risky business, and don't listen to what other people tell you, and tend well to your store. The insurance companies must pay the insurance what I am insured; they can't get out of it; if I am gone once, don't let people know for how much I am insured, or how much I am in debt. Keep it as much secret as you can, for not everybody need to know, for it won't make it any better; but when you get the money out of the insurance

companies, if it ever should happen so, don't think you would keep the money and not pay the debts."

Gentlemen, the printer has put stops that will mislead you in reading those printed copies, naturally no fault in it, but this is one of the places.

"If anything should happen you can pay the debts and have some money left, and keep all the property what we have, if you manage it right. The agents of the companies will assist you in taking the affidavits for proof of death," and so on. Also, "Lewis, I don't hope or expect to die soon, or get killed; but God only knows, we can't tell, life is uncertain, but death is certain. About keeping Llewellyn's insurance policy up, if he lives longer than I, you can do as you please, or as you think best. Try and keep everything as it is, and as quiet as possible; it is of no use to let everybody know how things are; I know if something should happen with me mother would trouble herself a great deal about it; if it should be the case, take good care of her whatever you do. If the insurance is all paid you can get along right well, and I can't see no reason why they won't be paid, for the premium is all paid on the policies, and the companies are all good companies."

One of the premiums was quarterly, and in a few weeks one of the quarterly premiums was to become due. "Mother's money you must take care what she gets out of the insurance companies, for she can't; you must see, too, that you will also find a receipt for your stock in the drug store, so that you can hold that; perhaps my creditors might try to get a hold of it, but I don't see how they can if you have this receipt, that shows that you paid me for it. If anything happens with me settle everything up all right and as soon as you can, and as quiet as you can; the sooner the better. If you sell the houses let mother buy them or get a good friend to buy them for her, and she can take the deed and give you the deed again. I think Henry Biel would be a good man to buy the houses for mother; you can't trust anybody, particular no stranger; perhaps if you would try and get Hess to buy it, he would not let you have the half; if you sell the houses for cash or a short credit they

won't come so high, and you can do that, because you get the money out of the insurance companies. If mother ever gets money of the insurance companies, if she lives longer than I do, you must take care of it, for she can't," and so on.

Now, gentlemen, I have, I believe, read to you, in one connection or another, every word of this paper, and at the hazard of fatiguing you. I have read it in this arrangement because it may possibly help you in your deliberations. If I have wasted the greater part of the hour in doing so, there is no harm done in the honest effort to save you trouble.

Now, that there was an early time for the expected settlement with the insurance; that he had an idea of some difficulty about it; that he includes the policy against accidents in the sum of the insurance money are the points of chief importance bearing on the question whether he meditated suicide, in my opinion.

In this immediate connection I will refer you to the interview with his sister, Mrs. Kresgy, because if the letter alone is sufficient or if it warrants suspicion, it may be increased by what passed at the interview with Mrs. Kresgy, and now certainly by the occurrence which followed.

Mrs. Kresgy was the widowed sister who had recently lost her husband, and on whom the deceased called on the Thursday before his death and it was probably the interview before the last of the third part of the letter was begun, certainly before it was finished. He called on this lady and after some conversation about garden seed, he began talking about the dreams of their parents, having seen them in his dreams. He said he was going to New York to consult a physician in regard to his hearing. He said it worried him so about his hearing; he was going to consult a doctor. He said he was going to New York, but if something should happen him, folks could help themselves. That visit, it is contended, indicates a purpose that he was in contemplation of an early death in connection with the intended visit to New York. He did not shed tears when he went away, but she says that after he got into the street he shed tears.

Now, she says, he often shed tears, and that he was a very

affectionate man, and that he had spoken of his parents and of seeing them in a dream, and talked with them; and he said going so often on a railroad he was afraid of being hurt on account of his deafness; advised about the husband's estate.

The question is, gentlemen, whether anything in this interview amounted to a leave-taking. It has somewhat that tendency, apparently, but we might have heard the answer, that it is only from what we know afterwards, a sort of after-born wisdom that makes us attribute importance to what may have been a mere ordinary occurrence; in its important relations I confess it has some bearing on the question.

But now, gentlemen, let us consider the occurrences which followed, because it may be that these occurrences are such that, compared with the letter and with the interview with Mrs. Kresgy, you may put them together and attribute a purpose that no one alone would satisfy you in attributing, and all of them together may remove a doubt that you might have as to any one in particular.

The occurrences which followed the letter, if they form the inferences of premeditated suicide, they certainly throw a great doubt upon the question of the firmness of any such resolution. This man is said to have been a religious person. He certainly was a man attentive to religious observances. Mr. Keeler, Mr. Bruler and Mr. Hartwig describe him as an attendant both on Sunday and on weekday, and at every service. He certainly, therefore, was a man observant of a respect due to religion, and the letter shows that he had a future state in mind. He says: "If God calls me home, or away from mother."

Now, gentlemen, if he contemplated suicide, I wish you to watch the evidence very carefully as I proceed in review of it in order and to determine whether he had any fixed purpose, whether it was a resolute determination or a floating thought, that he felt that he at times could not look the future in the face, and might or would probably commit suicide, or whether he had a fixed purpose to do it. He was not a man who without some proof, you would expect to be willing to rush uncalled for into the presence of the Almighty, as Blackstone says.

You would not expect him to be free from the dread of something after death that puzzles the will. He was not the man to be wholly dull and indifferent to such considerations, or like the novelist who makes his hero fall off the monument to cheat the underwriters. He did not appear to be that sort of a man, but he appears to have been a man who did contemplate an early and violent death.

Now, let us see what occurred after the night of Friday, at 8 or 9 o'clock; when he had finished a settlement he went home. He was at home by 9 o'clock or earlier, and he had his breakfast at an early hour, and soon after 7 o'clock the next morning, in pursuance of his purpose which he had stated to Mrs. Kresgy and Squire Kruler, he got into the early train to go to New York. There is no other evidence of his purpose than that he had stated to these two witnesses, and you will say whether that might not have been a sufficient purpose to take him there. He arrived at New York at or soon after noon. It was then raining. He had no umbrella, and he said to Mr. Worman, who separated from him as they arrived, that he would buy an umbrella and would return with him in the afternoon from New York.

Accordingly at half-past five in the afternoon, he came with his new umbrella, and he found Mr. Worman and he accompanied Mr. Worman in the cars home again. Mr. Worman has related the conversation. Others have said that he was cheerful. He had made an appointment with Squire Kruler to go a day or two afterwards in a sleigh to a neighboring place where they had business to attend to, and in riding home in the cars there occurred a circumstance to which I attribute some importance. The train was detained thirteen minutes in the neighborhood of Easton, or South Easton, I think it is. Now that thirteen minutes made him too late for the omnibus.

In this good town of Bethlehem they don't do as they do in any other place. Mr. Omnibus Man waits five minutes, and then says, "They are too late, I guess I'll go home," instead of waiting. Mr. Snyder knew this, for he says to Mr. Worman—Mr Worman doesn't recollect whether it was before or after that deten-

tion at Easton, but this makes it probable it was afterwards—he says to Worman, "I wonder if the omnibus will be there." Then you will observe a natural idea of the thirteen minutes' detention, and it turned out that the omnibus was not there at Easton. It was a natural suggestion, and the words "are you going to your store? for I don't like passing those bridges at night." You will recollect that Kœrner got killed on that very bridge.

Now, there was nothing more natural than that question, and the answer of Mr. Worman was that he was not going to his store, or would have taken him (Mr. Snyder), but that he was going the other way, towards his house at South Bethlehem.

Now, gentlemen, nothing can be more natural than that conversation; and it was a business-like conversation, which the event verified, because the omnibus in fact was not there when he got there.

Now, if he meditated suicide, it would have been a great comfort to him to have had somebody to go home with him to prevent it. From that conversation, in other words, if he did he was irresolute, and if there is any doubt about that, the doubt, I think, is removed, I think, upon the testimony of Mr. Wilson, is not that his name?

Mr. Fox—Yes, sir.

Now, counsel have made an attack respectively upon these two witnesses which I do not see the reason of at all. They contradict each other, in little, immaterial things, as to where they sat, and all that, but they confirm each other in the substantial parts, which is that Mr. Snyder would have been very well satisfied to have had somebody to go home with him that night. If the omnibus was there he would have gone in the omnibus and got home. If it was not there he would have gone with Worman, and he was not with Worman. Wilson's testimony is that they made an arrangement to meet the next day with a view to some business, and that the deceased man, Mr. Snyder, asked him to pass the night at his house. He asked Mr. Wilson to go and stay with him that night; Mr. Wilson de-

clined, and when they parted Mr. Snyder took leave of Wilson in what they called the aisle, and that I think a church phrase, and when they got to what they called the aisle, he repeated his invitation, and said he had better go home and stay with him.

Now, gentlemen, this transaction indicated, you may think, that if he meditated suicide he would have been very glad for an excuse for not executing his purpose that night. In other words that there was irresolution and no fixed purpose, but that he would if he found himself alone, no omnibus, no companion, occur to the thought of suicide, is quite consistent. But we have been leaving the car on its arrival at Bethlehem thirteen or fifteen minutes behind time, therefore losing the omnibus. We find him leaving the car on his homeward side, and there is evidence that he passed rapidly, as most persons do in front of the engine, and that two men were following him rapidly, as they would naturally do in front of the engine. I confess, gentlemen, I do not attach any materiality to that, but one of the witnesses says what is probable, that the man in front was Mr. Snyder, and that is just what would occur if he meditated suicide or not. I see nothing in that either way.

The counsel for the plaintiff thinks that these two men probably murdered him. It may be so, but I attribute as little importance to the evidence on the other side or to the assumed number of papers that he had to get rid of. I think that on the contrary these quite old people, and Lindeman one of them, escorted a lady and gentleman to the "Eagle." I do not think there is much importance in what they say. I do not say on a dark night; the gas was then burning in one or two of the hotels, that did not prevent people from carrying lighted lanterns, you will recollect.

On the whole, therefore, we find him in a situation in which we would expect him to go home. *Did* he go home? He certainly never reached home. Now, where do we next find him? And here comes a different part of the case. You find him, if you believe Henry Billing—I see no reason why you should not—we shall think of that presently—we find him lying on his

back on the footpath of the Lehigh Bridge, apparently asleep, at five minutes before ten. Billing would seem to have been a stagnant sort of a person, with not much more life than a clam in him, but a very good man, apparently. Billing says he used to take a journey every evening to the end of the bridge to put the lights out, and that he put the further light out first, and that he found upon the bridge a man that he supposed to be a drunken man, towards the furthest part from the toll-house, and that is nearest to the depot, you know.

He tried to wake him, and shook him gently, shook him harder, and got from him what the details are, that he got him up without much difficulty; that the man said during this time, "I am stabbed, and stabbed twice;" that as he was getting him up he thought it was Monroe Snyder, and that when he got him up he had the light thrown full in his face, he saw it was Monroe Snyder. In the meantime he told him what was very true, "You will be frozen to death;" and Snyder showed him the stabs. He could not see that he was stabbed, and he did not believe that he was stabbed, and that he then went his way and put the light out, and coming back looked for Mr. Snyder, and he was gone, and he went back to the length of 150 feet to the next hotel, and he could not see anything of him, and he then walked quickly back, and his daughter says in the meantime she had heard somebody go down the steps.

Now, Mr. Billing knew Mr. Snyder perfectly, and he says that when he last looked at him, he was sure it was Mr. Snyder. Is he to be believed? Why should he not be believed? Let us consider, a moment, if his testimony was very seriously damaged, because he gave the following account of what occurred afterwards. By-the-by I forgot to mention that he said he went into the toll-house and told his wife and daughter what had happened, but he thinks nobody else, while he then says that he heard next morning that a man was killed, and went down and took a look, but did not know who it was. He then went back and soon after heard it was Monroe Snyder, and he concluded that maybe Snyder's friends would think that he ought to have looked to him, and that he would not say

anything about it, and did not say anything about it. He thought they would blame him. But when he saw it was going to be a serious matter—he did not use these words, but that is what we may understand—he thought it was his duty to let Mr. Misch know. I do not know whether we are to say what Mr. Misch and Billing's relations were or may have been. He was somebody that Billing had gone to get coal from, and whom you may estimate was a person somewhat in authority so as to give advice. I do not know whether he was; I do not know whether he was high in Squirearchy.

Mr. Fox—He was a coal merchant.

Court—His previous dealing had been then a constable, if you go into it, I know it, but it is not evidence. He went to Mr. Misch, and he told Mr. Misch, I know something about it. That was very natural, and by Mr. Misch the subpœna was issued. Then he went to the inquest and he found he was not wanted that afternoon, and the next day or the day after.

The present chief burgess, Mr. Irwin, sent for Mr. Billing, and he, Mr. Billing, found himself confronted with two New York detectives, and Mr. Irwin wanted him to tell those detectives all about it, and he said he would not give any statement except what he would give on oath before the coroner's inquest.

Now, when this was gossiped about Bethlehem, and he was going to be examined before a coroner's inquest, the question is whether there was anything extraordinary in his saying that he would not say anything about it before he came before the coroner's inquest, having been already subpœnaed. He had given information to the chief magistrate, so he thought if there was nothing else, and if there was an inquiry going on before the coroner why should he not think that he could withhold his testimony and not trust it to the official to whom his testimony would be delivered? And then the detectives, to his great amazement, told him all about what he has testified, when he was thunderstruck and held his hand up in utter amazement.

Now, gentlemen, I don't know—it does really appear to me that is the most natural thing in the world how that got out,

for how did that—I ought to say that I did think his testimony defective, because it seemed to me that if he had forgotten what others now suppose he never thought of telling to the coroner, it would show certainly a careless memory, which should make his evidence very little to be trusted. Now, when you consider that he had told his wife and daughter, as I said to you before, the young men and the old women of Bethlehem were all talking about it. I don't suppose there was any great mystery about it. It is true the doctors were not asked whether they told anybody, but if they had or had not, it would not be surprising. On the whole, it appears to me to be not the least mysterious that these detectives knew all about it, and if so it confirms Mr. Billing's testimony, because it seems to me he had given the same account when the transaction was fresh and so his wife and daughter could tell it. On the whole, therefore, I cannot see what there is against this man's testimony, except the supposition of the witness as to what occurred before the New York detectives went upon this, what proved to be a hunt in the wrong place. If he did say it, it detracts somewhat from the accuracy of his evidence, and may have been in this respect mistaken. There was some carelessness about the date.

I do not know, on the whole, gentlemen; it appears to me that it would be very unsafe to reject or disregard in any way the testimony of Mr. Billing.

If it is true, then how stands this case? Can we mince this matter by speculations about going to church or about anything else? Here was a man who should have been at home, and was found lying on his back, with, as he said, wounds. If these were the wounds already inflicted, and he had laid down there to die, and had got asleep and was likely to be frozen to death with the cold, how does that alter the aspect of the case, unless you believe that the wound had been inflicted by some person who had left?

Now Mr. Snyder, the deceased person, if that was the man on the bridge, did not make a long stay on the bridge. He went his way towards home, and he said, I can go home, so

Mr. Billing tells us, but independently of what he said what he did was the same thing as saying it; he went toward town. Here was then, a man who, after more than half an hour, is found in this position, saying he was stabbed, moving towards home and not reaching home. How does this present itself to your mind? How are you going to explain it? Do you believe that he had been wounded by men who had left him there, if so, you will adopt that theory if you think it a rational one. If you believe what he said was untrue about the wounds, if he must have had some thought that he would not state, that is, therefore, an explanation that diminishes the difficulty. Then he was wounded, as he said, able to walk, to go towards home, even though he might have been frozen to death and got to sleep after the wound. Why did he not reach home? What was the impediment?

Now, gentlemen, as to the evidence which follows. Its effect depends probably on what effect you attribute to Billing's testimony. As to the subsequent witnesses, I do not think that, in the absence of Billing's testimony, they sufficiently identify Mr. Snyder as the man who was seen, although I would leave that entirely to you as a matter of fact, but that the testimony of Mr. Billing with the testimony which follows suffices entirely to convince you that Mr. Snyder, in a state of irresolution, unwilling to execute his purpose, hesitated, not content to go home, nor with firmness enough to take his life, was rambling about. Now if you take this theory, as to that, and all that is a mistake, though you will decide upon that yourself, and tumbling about in the dark at night; if he is the man referred to by the subsequent witnesses, then it is almost impossible not to look back to this letter, however obscure, and not to look back at Billing's testimony, not to look back to his interview with his sister, not to take a painful view of this occurrence.

Well, is he seen afterwards? Mr. Fetter, who really, it appears to me gave his evidence with the greatest possible candor and simplicity, and not to have hesitated to say that he was frightened, told us naturally that he should be in a certain posi-

tion in which he stood to look very carefully at what he might have seen. Mr. Fetter, we find that between I think 11 and half-past 11, and before I read this part of the case, gentlemen, I shall have to go back. The buttoning of the clothes seems to me to be fully explained by Billing's testimony. You have heard a good deal about the clothes being found buttoned. He says the overcoat of Mr. Snyder was open; he cannot tell whether the under coat was buttoned or not, but he raised his vest. You recollect the waistcoat too was on. Now, if Mr. Snyder was able, with the cuts which he said he had; if he had inflicted those cuts himself, and he was able to walk off the bridge he was able to button the coat, and the mystery ceases to be a mystery of which you have heard so much, and the same explanation can be made of his gloves. It was cold, he buttoned his coat and he put his gloves on. That part of the subsequent examination of the case seems to me to be explained, and to be attended with no mystery at all if you give full effect to Billing's testimony.

Now, was he seen afterwards? Did he remain on that bridge without going home, or was he dead, or soon after murdered by one or more unknown men, or the same men who crossed after him in front of the engine, or some other man or men, or by some man who was heard talking to another about how to divide some money, or any of these suggested facts?

Why, gentlemen, if Billing's testimony is true, it requires a great deal of self-possession to comprehend how this man was not taking care of himself, and why he did not go home, and so forth.

Now I will go back and refer to Fetter's testimony. Fetter was going from the hotel after 11 o'clock, and he saw a man whose actions frightened him, and well they might.

Mr. Fetter says that between 11 and a quarter past 11 he passed down Main street on the sidewalk on the west side of the way.

Did you see anybody on or near Monocacy Bridge?

Answer—"I did going down the plank walk, all by himself.

I passed the man just far enough—then occurs a blank in my notes—I saw it was a man going across slowly; I was going pretty fast myself; I could not very well tell whether he was standing or moving; as I neared him I saw he was going from me; I slackened my pace; he was about as far as across the room on the bridge, his back to me and walking slowly."

Question—Describe the appearance in dress.

Answer—"I could not see him; he was a pretty tall man with hands in his pockets; a pretty stout built man, 5 feet 5 to 5 feet 10 or 11; hands in his overcoat pocket; I kept walking on upon the walk in the middle of the road until we passed across the bridge about five feet, and he turned abruptly on his heel and came towards me, and I got still more alarmed, and here is a little blank in my notes; and I passed him and looked back, and he done the same to me; I passed him and did not look around again, and went home; that was between 11 and a quarter past 11; he was going in the opposite direction from the bridge slowly as before." And he describes a man going and coming back; you will recollect it. "I had known Mr. Snyder not very well; the man passed within six feet of me; I did not think all the time it was Mr. Snyder; did not recognize him; I had seen Monroe Snyder occasionally;" then there is another blank in my notes.

Now, gentlemen, this evidence certainly, in the absence of Billing's testimony and the testimony which follows of the three men at a later hour, would be very unsatisfactory, in fact I should advise you to consider it no identification at all; however probable it might be it would be but probable. But we come to a later hour, when there is something more like identification. There is a man whose name is Sceitzer or Schreiner, it does not matter, who was engaged in the zinc works, and who was walking home after two o'clock at night, and Bush and Barr, who you recollect were one of them going home in a sleigh and the other one walking. This sewing machine man, Swifel, so Bush also says he saw a pretty tall man walking in front of him towards the Monocacy bridge. He describes his size and walk, and says the man was not black,

that he was a white man, and he saw him all the way from Fetter's hotel to the Monocacy bridge.

Bush fixes the hour at a little after two. He saw Swifel at this time. Arthur Bush was driving an express waggon for the Reading Railroad, and Friday night or Saturday morning he continued in his employment and he continued every night except Sunday night until ten minutes after one, and remained there until two, to meet the down train. In the morning I was too late; the train was a little late; I was kept until the train came, and then Mr. Snyder came in the train and proposed to go with me, which he and Mr. Bearing did; then the man from the zinc works, Swifel, passed by; I spoke to him; he wanted me to go to; and I did go on.

Now, the next man he met was on the other side of the river bridge. "The next man I met was on the southern side of the canal bridge, going out of town, about in the middle of the street; got close to him; he got on the corner; I said, you are going then; if so come on; this man said nothing to me; I said to him, I was mistaken, I thought it was another man; I was in the middle of the street; he was on the side; about as far as from me to the judge; I was leaning against the omnibus; he was a pretty good-sized man; about Judge Porter's size."

Mr. Porter served as a model for this and other witnesses. This man was similar to Mr. Porter.

THE COURT—Mr. Porter only as to size?

"He was, I could not say how; he had on a large coat and hands in his overcoat pockets."

The testimony of these two witnesses without Mr. Billing's would amount to very little; but the same man whom they saw was seen by Billing and to his testimony more attention is due. That he recognized this person as someone he thought he knew, and resembled Monroe Snyder, whom he did know. He says, I recognized the person as some one whom I knew, and resembling Monroe Snyder, whom I knew. He then describes him. He says it was a pretty cold night. A few minutes after starting the man passed on ahead of him, and I started off; passed Fetter's residence; I saw a person on the Monocacy

bridge, on the south side, about twenty feet from the south end of the bridge; when I first saw him he was leaning in this position; I myself was in doubt; I suppose he recognized me; he turned and walked towards me; I stopped; went on fast; walked to say, within a foot of the person; when I first saw him he was going north; he came to a standstill; he was facing me; as soon as I saw I could have my place, the place that I wanted, I stopped; looking around over my shoulder I saw the man standing pretty much where I left him; I passed up the street and went home, and recognized the person as the same one whom I thought I knew; he resembled Monroe Snyder, whom I knew; the remaining testimony is not important.

Now, gentlemen, I think this is sufficient identification for us, if it is to be considered by you for what it is worth; if Billing tells the truth, and, as I said, I see no reason why we should disbelieve him; and if Monroe Snyder, as is unquestionable, never got home, and a man is seen by these three persons in this attitude, and with such means, whose figure resembles Monroe Snyder, with Billing's testimony, and the fact that he had not got home, there is not much evidence, if it satisfies you, of identification, for your consideration. I do not state that as a matter of law, but as a matter of common sense, for what you think it goes.

So, then, this man roamed around in the darkness of this night until after two o'clock. Was that Monroe Snyder? Had he, before or after he was with Billing, stabbed or attempted to stab himself? Had he passed or crossed the bridge without going to his house? Had he thus been on the bridge? If so, there is evidence tending strongly to prove that he was meditating suicide; that he was irresolute; that he could not bring himself to carry his purpose into effect; that for the want of an instrument to stab himself he could not stab deep enough; that if he meant anything else he could not execute his purpose; in short, he was very irresolute.

Now, gentlemen, it does not do to theorize about what may have occurred. If we can find any other rational view of the case, it would be very irrational to say that he had been all this

time meditating suicide. He nevertheless might have been afterwards murdered and thrown over, but if you can find any other way of reconciling the evidence, as I said before, probabilities are not facts. If he was the same man, as the defense alleges, thus roaming about, he certainly had not had courage enough to execute his purpose, however you may believe that he meditated it.

I do not say that we have any other light upon this case to guide us until we come back to what we first considered, the place where the body was. Before we come to that, however, I would say this to you, that if you believe he meditated suicide, whether he made that resolution after the cars had been detained at Easton, or had formed it as long before as forty-eight hours, when he was conversing with Mrs. Kresgy, some earlier time, when he was writing this paper for his son, for I say, if you find that he meditated suicide, then I would advise you to attribute his death, for it is for you, and not for me, I only say as the thirteenth juror, I would advise you to attribute his death to the purpose he had formed, if you can reconcile the way the body was found with suicide. But observe, you must be convinced that he meditated suicide, and that the position of the body was consistent with the commission of suicide. If, on the contrary, gentlemen, you doubt his identification by Billing, if you disregard the loose identification which followed, if you think the writing and the interview with Mrs. Kresgy can be reconciled with a more natural and more innocent purpose, why then there is no trouble in your verdict; but supposing that you cannot get over these things; supposing that he did meditate suicide; then let us recur to the crisis; how did the body get where it was found? Could it have reached the position where it was found without some other human agency than that of the deceased man himself?

Now it is not for me to pass over that part of the case after the long delay I have subjected you to. You have heard all about it. You have heard the arguments there are about the idea. You have perceived already that it is by no means an impossibility that a murderer would throw a man over, intend-

ing to kill him, from that height. That a man himself should form that idea, intending to commit suicide, deserves some consideration. If he happened to fall on his head it would do it very completely. It is for you to say whether there would not be more than that blood on the hat, and whether his skull would not be dashed to pieces; but he might not have fallen on his head. It is not like the man on the monument that Dickens wrote about in the flippant way I have indicated. Might he not at least have broken his arms or legs and saved his life and not been killed by it? Did he choose that mode of death, therefore, if he wanted to commit suicide? You cannot say say that he did not, but did he? The fact is evident, the body was found; but is it found where it would have been consistent with such a purpose? And if you find the purpose executed you might get over the difficulty; but if you find that the body could not be where it was without some other human agency than his own. Have the defendants succeeded in proving suicide? The burden of proof is on them. I don't mean to bring it beyond any human doubt; I mean within a reasonable ground. Have they failed in the affirmative issue which they have taken upon themselves? And I advise you to take the theory of suicide and look at that ground, remembering the testimony of Mr. Leer and the others, attributing such effect as you think right to the footsteps; but, as I think more important, looking at the positions, you cannot mistake the nature of the question.

If you think that that man could have got to the place where his body was found without some other human agency, then your verdict should be, I think, for the defendants.

If you find from the evidence that he meditated suicide, I don't say that as a matter of law, but as a rational conclusion from the evidence; but if on the contrary you find (and I don't know how far a man of fifty can jump, but I believe nine feet is a pretty good jump, we young men think thirteen feet a pretty good long one, I don't know), you can take into consideration those measures; some of the jury know, I have no doubt. But as far as a man could jump, he would fall much

short of it. There would be a curve inward before he could get to the ground, and if you think he could have got, by his own jump, more than six feet, then his body was found twenty odd feet from the bridge, as I understand the evidence. Could he have got there? One of the counsel supposes that he had turned a somersault and got there. I believe another of the same counsel put an alternative, that he had come to, or crawled, or thrown himself. If you think this rational or creditable, or if you think that that could have been done in any way, then you have got the other question, whether he intended it. If you think, further, that he could not have been where he was found, without some other human agency, then it would be forcing things to say that he committed suicide and murder both, or that he attempted suicide and was afterwards murdered and dragged to the place where he was found. These are fancies which you will hardly entertain.

Now, gentlemen, there is no apology at all for the time I have taken, because if I can save you trouble I shall be glad to have done it. I leave that part of the case. You understand what the question is, and you will say whether you find that Monroe Snyder died by his own act or not.

I come now to some similar questions in the case. They all grow out of one fact. It seems that in the year 1868, I think, when Mr. Snyder was agent for the Slate Company, he was either loading or unloading a waggon at a railway car, and he fell and struck his head against the wall or ground, (it does not matter), and was stunned for some minutes. He had a bump on his head; I think that is the whole evidence; but whether he was able to get into his carriage is for you. His son had come to drive him home in the meantime. The Railway Company, being very properly vigilant, as a matter out of which lawsuits might arise, sent for their physician, who arrived in time to see him get into his carriage. Mr. Snyder seems to have allowed the physician to make six calls at the expense of the Railroad Company; but the physician says he did not find anything particular the matter with him, and did not recollect giving him anything but nitre. It

was not in evidence that he took to his bed at all, and in a few days he was quite well.

As to the point of law, I will instruct you, that if Mr. Snyder accepted the services of the physician, he ratified the employment of him by the Railroad Company, and it was the same thing in law as if he employed him himself; but it is not evident that it was the same thing in fact.

As to the seriousness of the injury that is for you to consider. It is the same thing in law, as to the question of employing a physician, of the seriousness of the injury. This matter you will give such effect as you may think due to it.

Now, in the post-mortem examination, it was found that there had been a slight adhesion, probably at the place where he got this bump. That adhesion, the surgeon told you, would have occurred from a very slight injury that would not have made him unsound. If I understand the testimony rightly that is about the whole of the case.

Gentlemen, upon these simple facts four legal propositions are put to me:—

First. The written applications, as made by the insured, dated respectively September 18th, and the subsequent July 9th, 1872, and January 10th, 1873, constituted the basis of contract of insurance, and Monroe Snyder having, in answer to that part of the question in No. 13, in which he asks, "Have you ever had a disease or any other attack?" Answered, "small-pox, thirty years since." But you have the uncontradicted testimony that Monroe Snyder had a severe fall on his head on the ninth day of December, 1867. The answer to this part of the question, No. 13 in the application for which the policies are issued, is untrue, and the plaintiff cannot recover the said policies.

I answer, if the jury find that the fall on his head was a severe one, or that it injuriously affected any vital part, the verdict in this case should be for the defendants.

Second. The written application for the policies signed by Monroe Snyder, the insured, on July 9th, 1872, September 18th, 1872, and January 18th, 1873, form the basis for the con-

tract for the insurance of Monroe Snyder, and he having, in answer to the question No. 14, contained in application, "Have you ever had any serious illness, disease or personal injury?" answered, "Small-pox, thirty years since," and the testimony uncontradicted is, that on the ninth day of December, 1867, Monroe Snyder had a severe concussion of the brain, the answers of Monroe Snyder are untrue, and that the plaintiff is not entitled to recover on any of the policies sued on.

Answer—If the jury finds the concussion of the brain a severe one, the verdict in such case should be for the defendants.

Third. A severe fall, by which the head is struck, resulting in concussion of the brain, is a severe personal injury, within the meaning of the term used in the several applications signed by the insured.

Answer—If the jury find that the blow by which the head was struck was a severe one, resulting in concussion of the brain, it was a severe personal injury, within the meaning of the term within the several applications.

Fourth. If the written applications, bearing date September 18th, July 19th, 1872, and January 10th, 1873, signed by the insured, form the basis of the contract of insurance, and the policies were issued upon the express condition and agreement that if any of the statements and declarations made in the applications be different, or in any respect untrue, then the policies should respectively be null and void; and Monroe Snyder, the insured, having, in answer to question seventeen in the said policies, which is, "How long since were you attended by any physician, and for what disease? Give name and residence of such physician," answered, "Not for twenty years;" the testimony is unimpeached and uncontradicted that Monroe Snyder was in the month of December, 1867, attended several times by a physician for a severe fall upon his head, this answer is untrue, and the policies are thereby rendered void, and the plaintiff cannot recover upon them.

To that I answer that if the fall upon the head for which Monroe Snyder was attended by a physician was a severe one,

the answer in such case was untrue, and the verdict in each case should be for the defendants.

It is not contended that every bump on a man's head, received from a fall, is enough to induce an affirmative answer to these questions; but I leave it for you, whether you think so, as the questions imply.

The case is with you, gentlemen.

Verdict for plaintiff for amount of policy with interest.

DISTRICT COURT. JUNE 18, 1874.

ADMIRALTY.

LACHENMEYER *v.* THE BRITISH SCHOONER ANGELINA. WATSON & SONS *v.* THE SAME.

Charterer's right to have vessel perform voyage. Ship-broker estopped from attachment. Practice. Sale of foreign vessel, unclaimed, on bottomry bond.

LIBELS for advancements for repairs.

JUNE 15. Otto Lachenmeyer filed his bill against the schooner for a balance of $390.65, on account of advances made to her for necessary disbursements and repairs in foreign ports, amounting to $16.39. The libel was allowed and the vessel arrested.

June 17. An amendment to the libel was filed striking out two bills claimed for, amounting to $174.39.

Eo die. Messrs. Day & Carter filed their libel for necessary repairs in a foreign port, amounting to $159.77, being one of the bills stricken out of Lachenmeyer's libel by amendment. Libel allowed and vessel attached.

June 18. Messrs. Thomas Watson & Sons came into Court and exhibited statement of facts agreed upon by all parties in interest, whereby it appeared that Otto Lachenmeyer, the libellant above named, had acted as ship-broker for the Angelina, in negotiating a charter party between the said schooner and Messrs. Watson & Sons; that in pursuance of such charter party

a cargo had been placed on board the schooner, and some $500 paid to Lachenmeyer on account of the schooner, as advance freight (which was credited in the account annexed to his bill).

McMurtrie appeared for the Messrs. Watson and moved that the schooner be released from arrest under the process issued on libel of Lachenmeyer, on the ground that one who acted as ship-broker in negotiating a charter, could not afterwards assert a claim against the vessel, in such a manner as to interfere with the voyage for which she was chartered.

Coulston, for the Angelina.

Boudinot (with whom was *Flanders*), for Otto Lachenmeyer, argued that a ship-broker who had acted in good faith in bringing together master and charterer, was not precluded from pressing all his legal remedies for the recovery of such balances as might afterwards be found due to him for his disbursements; and that it would be against the interests of trade that he should be so precluded.

THE COURT ordered that the vessel be released and allowed to proceed on the voyage for which she was chartered, unless detained on other process than that of Lachenmeyer.

The same day, claim of Holbrook, master, filed and stipulation with J. B. Watson (of Messrs. Watson & Sons), as surety in the suit of Day & Carter, and vessel released.

June 22. Holbrook, master, filed answer in both suits, not denying the justice of claims, but objecting to certain items amounting to $172.62 in Lachenmeyer's libel, as not being the subjects of lien; and alleging his belief that Day & Carter's claim had been paid by Lachenmeyer.

August 29. Thomas Watson & Sons filed their libel against the schooner on a bottomry bond alleged to have been executed June 18, 1874, for $1,564.00 according to account annexed for $1,497.05. The libel was allowed and the vessel arrested by the marshal.

September 3. The petition of Otto Lachenmeyer was filed, setting forth the above facts, and praying that attachment against the vessel might issue as upon his original libel or otherwise.

Whereupon THE COURT ordered the petition to be filed as supplemental to petitioner's original libel, or as of intervention in the suit of Watson & Sons, and ordered attachment to issue.

September 4. Affidavit of T. B. Watson filed, setting forth that the vessel is perishable on account of changeableness.

Coulston for Watson & Sons moved for appraisers.

Whereupon THE COURT appointed appraisers and ordered them to report whether there was any special reason for an early sale.

September 7. Report of appraisers filed, recommending early sale, and valuing the vessel at $3,000.

September 25. Due proclamation having been made, on motion of *Coulston* for libellant, THE COURT enter decree *pro confesso* in favor of T. B. Watson & Sons for $1,568.61 and writ of sale ordered, returnable October 16.

October 9. Writ of sale returned, sold to John C. Rayming, for $2,100. Whereupon, on motion of *Coulston*, for libellant, and the filing of affidavit of service of notice to owners, THE COURT approve and confirm the sale.

DISTRICT COURT. JUNE 20, 1874.

ADMIRALTY.

LEEDS *v.* THE SCHOONER L. AND M. REED.

A Court of Admiralty cannot prejudge questions of accountability and proprietary right in a mere possessory suit. They should be decided in a Court of general equitable jurisdiction.

THIS was a cause of possession. The libel set forth that the libellant was the owner of one-sixteenth of said schooner of which Walter S. Steelman was the master; that he gave Steelman a power of attorney to sell said interest; that Steelman conveyed it to his wife, alleging $1,500 as the consideration therefor; that afterwards Mrs. Steelman conveyed to one Joseph E. Abbott, on the same alleged consideration; that afterwards Abbott reconveyed to Steelman, the consideration being still the same; that the ves-

sel stood in the name of Steelman, who had failed to account to libellant either for the purchase money or his share of the earnings of the vessel. The prayer was that one-sixteenth part of the said schooner should be delivered to libellant together with the earnings of said share since the last accounting by the said Steelman.

On the libel is the following endorsement by Judge Cadwalader.

"1873, December 17. This libel is allowed either in *rem* or in *personam* so far as any question of possession, securing possession, or deposing the defendant from the command or control of the vessel may be concerned. But so far as the question of his past or present accountability may be concerned the Court must be further advised before acting."

The following opinion was subsequently filed:

CADWALADER, J.

The Court is of opinion that whatever may be the merits of the questions of proprietary right, and of accountability, as between the parties litigant, those questions are not such as ought to be prejudged in a mere possessory suit in a Court of Admiralty. The Court intimates no opinion as to the probable adjudication of these questions in a court of general equitable jurisdiction.

The doubts of the Court are such that it might possibly at the instance of the libellant, require security of the defendant to account for one-sixteenth of the nett earnings of the vessel during such reasonable period as may be sufficient for the determination of the questions of title, &c., in another Court. But the Court does not encourage the libellant to proceed further in this Court, where the relief would, at most, be of a very limited kind.

If the libellant asks that his libel be dismissed without prejudice, &c., the Court will make such an order; and will hear the defendant's counsel on the question of costs. This question of costs may depend upon several inquiries, all of which are already sufficiently presented.

DISTRICT COURT. JULY 21, 1874.

ADMIRALTY.

BRADY *v.* THE AMERICAN STEAMSHIP COMPANY, OWNERS OF THE STEAMSHIP PENNSYLVANIA.

1. The rule of maritime law that a passenger who has no opportunity to leave a vessel in distress, cannot render a salvage service, may admit of a qualified exception where he has promoted her safety by an extraordinary and peculiar service which he was not compellable to render. But in admitting such an exception in favor of a passenger, the greatest caution is necessary, and especially so where he is of the nautical profession.

2. Where a passenger of the nautical profession who had rendered such service, afterwards assumed and exercised illegitimate authority over the vessel, though the circumstances were not such that he incurred an absolute forfeiture of the salvage compensation, its amount was nevertheless materially reduced by reason of such usurpation of authority.

LIBEL and amended libel of Cornelius Brady, against the American Steamship Company, of Philadelphia, owners of the steamship Pennsylvania, for salvage.

STATEMENT OF FACTS.

The libellant was a passenger on respondents' steamer, "The Pennsylvania." During a severe storm at midnight a heavy sea stove in the forward hatches and carried away the master and first and second officers. The third officer was engaged in securing the hatches, not knowing of the loss of his superiors, when the libellant, who was an experienced master navigator, some twenty minutes after the loss of the officers, went to the wheel house and assumed control of the steering and speed of the vessel. (That in doing so he assumed command of the vessel was denied by the respondents.) The third officer, when he discovered the position of affairs, did not at once interfere. The next morning, the chief engineer, purser and others, without consulting the third officer, requested the libellant to continue in command, which he did. On the arrival of the vessel at Philadelphia, respondents sent a letter of thanks and compliments to the libellant, enclosing a check for $1000,

by way of gratuity; this the libellant returned and libelled for salvage.

R. E. Shapley (with whom was *Charles M. Neal*), for libellant, cited:

The Salacia, 2 Hagg. 262.
Newman *v.* Watters, 3 Bos & Pall. 612.
The Harmony, 1 Pet. Admiralty 70.
Tirole *v.* The Great Eastern, 11 L. T. (N. S.), 516.
The Merrimac, 1 Benedict 201.

M. P. Henry and *Theodore Cuyler,* for respondents cited:

The Two Friends, 1 C. Rob. 285.
The Branston, 2 Hagg. 3 N. 2.
The Fair American, I Pet. Adm. 89.
The Neptune, 1 Hagg. 227.
The Vrede, 1 V, Lush, 322.

CADWALADER, J.

A vessel manned and otherwise fitted for a voyage, is often spoken of as having an organized representative or artificial personality. A public armed vessel represents the sovereignty of the nation to which she belongs. A merchant vessel represents a little private community. It is a definite organized portion of the social system of her nation. Judges, on both sides of the Atlantic, have assimilated such a vessel, when on the high sea, to a floating portion of this nation's territory, of which, though temporarily detached, it continues to be a part. Her internal relations are determined by its laws, and her external relations by the laws of the sea, which constitute a part of the system of universal jurisprudence. Under certain qualifications her exterritoriality is, through international comity, recognized, even when she is in foreign territory.

These observations, in part, explain the remark of Montesquieu, that mariners are citizens or inhabitants of the vessel. They cannot rightfully leave her, unless their association with her is legally at an end, through the conventional termination of their voyage, or otherwise. Till then they can be compulsorily detained in her.

The relation of a passenger to the vessel is different. If a sailor has been rightly described as an inhabitant of the vessel, and as in subjection to her government, a passenger may be compared to a mere sojourner in her who is only in temporary subjection. A passenger, while on board, may, indeed, be considered as one of her company, but not in the same light as one of the crew. The passenger may leave her at his pleasure, if an opportunity occurs before the end of his conventional passage; and may do so even in time of danger, however great.

For this reason, if the vessel is in distress, and a passenger who has an opportunity of leaving her chooses to remain on board, he may stand afterwards, upon a question of salvage service, nearly or quite in the same relation as if he were not associated with her at all. He may therefore entitle himself to compensation of the nature of salvage, by rendering even service of ordinary bodily labor, as in pumping, or otherwise. But where he has had no such opportunity of disassociating himself from the vessel, he is, in time of danger, compellable to render, to the utmost of his ability, like service with any other person of her company, and as to such service cannot have any claim of salvage.

It by no means follows that a passenger peculiarly capable of rendering extraordinary service, far beyond that of one of a good crew, is, in all cases whatever, compellable to render it, or that, if he does render it with useful effects, he cannot, in any case, become entitled to compensation of the nature of salvage. We may suppose the case of a ship, or her cargo, partially on fire, the ship having on board a passenger who is a chemist, with a sort of travelling laboratory. He may have, in this laboratory, the probable means of checking the fire, but perhaps not without some risk to himself and others, of increasing the danger. If, by professional skill and judgment, under the authority of the navigator of the vessel, the chemist makes the experiment, and there is a successful result, is he to receive no compensation? If he should be compensated, is not the compensation for a service of the nature of salvage?

The decision in the case of the steamer Great Eastern an-

swers the question. When that vessel was three hundred miles from land, her paddle-wheels were disabled, so that she could be moved by the screw alone. While she was in this condition, the rudder shaft was broken, and was disconnected from the steering gear, so that she became quite unmanageable. Her officers in vain endeavored to substitute and secure some appliance by which to work the shaft. A passenger, who was a mechanician, then devised, and with the consent of the master and the assistance of the crew, executed a plan for the purpose, which was successful. This was done by a skillful use and adaptation of fixtures, tackle and apparel of the vessel herself. For the service, $15,000 was decreed to the passenger as salvage; (11 Law Times, N. S. 516). The reason of the decision was that this highly beneficial service had been peculiar and extraordinary, and such as he was not compellable to perform. This decision is, I think, right in principle. But it establishes what must be considered as an exception from a rule. The rule is that a passenger cannot be a salvor. The exception, lest it should engender litigation, and promote insubordination, must not be admitted without the greatest caution. Especially must such caution be observed where the passenger is of the nautical profession.

In the present case, a large steamer, worth perhaps half a million of dollars, with passengers and a cargo, having four officers, besides the master, encountered, in mid-ocean, a tempest of great violence. During the storm, when changing watches, at midnight, she shipped a heavy sea, which stove in the forward hatches, and swept away the house-forward, carrying overboard the master and the first and second officers, with two of the crew.

So long as any officer of a vessel is on board and not disabled, there can be no suspension of the executive authority of her internal government. Therefore, at this crisis, the command legally devolved, at once, upon the third officer. He, however, did not assume it, but was for some time fully and usefully engaged in securing the forward hatches, or in superintending the securing of them. The fourth officer had been previously dis-

abled, and was not on duty. The wheel was fully and properly manned, and this was at no time otherwise. But there was no officer of the deck surviving, and there was urgent necessity for such an officer to give directions to the men at the wheel. It was a crisis of great peril. There was, at all events, great seeming danger; and it would now be mere idling to inquire speculatively how far actual danger may really have existed. The after-born supposed wisdom, from such a retrospect might be arrogant folly. There certainly was also great alarm, with ample supposed cause; and a general panic, if not prevented, might have soon ensued; and this might, in its consequences, have been dangerous if not disastrous.

At this crisis the libellant intervened meritoriously. He was on board simply as a passenger, who, as such, had paid his fare. He was a competent professional master navigator, with former experience in the command of sailing vessels and of steamers. He went to the wheel-house and promptly assumed command or direction there. doing whatever was necessary and proper for the exigency. He thus averted, until the termination of the storm whatever danger may have been caused by the unfortunate loss of the master.

I think that this was a salvage service. The difficulties in the way of so deciding are great. But those in opposition to a contrary decision would be greater. It is true that when the third officer succeeded of right to the command of the vessel, he might have ordered the libellant to take the watch during the emergency. The libellant would certainly have been compellable to go to the wheel-house. If he had been directed, when there, to act as officer of the deck, it would, I think, have been his duty to obey, and to execute the office to the best of his ability. Had he done so, under such orders, I do not, as at present advised, think that it would have been a salvage service. But, without orders, he was not compellable to decide who should have the watch, or to take upon himself the direction, with its cares and responsibilities.

At the crisis of danger there was no means of organizing the internal government of the vessel, unless through immediate

energetic action of the third officer. That officer did not thus act. The libellant was therefore, justifiable, under the law of maritime necessity, in acting upon his own responsibility, as officer of the deck. There was, at this time, therefore, no usurpation of unlawful authority by him. This being so, his conduct thus far was meritorious and highly beneficial; and the service was, under the circumstances, extraordinary. It was a peculiar service for one who was not of the crew to take the command of the watch without being assigned to it.

On the next morning, the storm having ceased or abated, and no special danger continuing to exist, the chief engineer and the purser, and some others on board, without consulting the third officer, whose authority alone they should have recognized, wrongfully assumed upon themselves to offer the command of the vessel to the libellant, and urgently invited him to assume it as master. He very improperly did so. He did not consult the third officer, but nominated him as first officer. It is contended that the third officer acquiesced in what would thus otherwise have been a usurpation. An English judge has recently said that quiescence is not acquiescence. Mere enforced submission certainly is not. The third officer here submitted, but did not acquiesce.

The libellant continued to act in this usurped relation of master of the vessel for several days, until she reached the port of destination.

On her arrival, the owners, who are here defendants, gave thanks, in writing, to the libellant, as for extraordinary services, and offered him what would have been a liberal gratuity for meritorious conduct if he had been an officer of the vessel. But the amount offered was greatly below the least possible estimate of compensation for a salvage service.

He now alleges that he became of right master of the vessel, and thus rendered a continuing salvage service. This unfounded pretension, is of course, rejected.

The question then arises, whether through his usurpation of the command of the vessel after the storm, he has incurred.

a forfeiture of the salvage compensation to which he was otherwise entitled for his prior service.

I do not think that, under the peculiar circumstances of the case, an absolute forfeiture of the whole amount was incurred retroactively by his assumption and exercise of the illegitimate authority. But the effect of this usurpation must necessarily be to reduce very materially the amount which would otherwise be awardable to him.

What the reduced amount ought to be is not easily determinable. I have hesitated between three thousand and four thousand dollars, and have determined on the greater sum, partly because I think that the defendant's letter of thanks almost invited the litigation which has followed, and though not so intended, must have induced a high estimate by the libellant of the value of the service.

Costs are adjudged to the libellant; but under the head of depositions, taxable costs will not be allowed to an amount exceeding two hundred dollars. The testimony is of great bulk, but of no proportionate weight; and its excess in bulk ought not to be allowed to swell the costs. Decree for libellant for $4,000, provided that, under the head of depositions, costs exceeding two hundred dollars will not be taxed or allowed.

DISTRICT COURT. SEPTEMBER 11, 1874.

ADMIRALTY.

THE MAIR and CRANMER *v.* THE CASTNER.

The anchoring of one vessel so near another in harbor without necessity as to make accident possible in an ordinary maritime risk, is negligence and will render the offending vessel responsible for a resulting injury.

COLLISION. The schooner Samuel Castner, trading between the ports of Philadelphia and Boston, came to anchor at Nantasket Roads, lower harbor of Boston, on the night of November 17, 1873, at a distance of about a quarter of a mile from

the schooner Mair and Cranmer, then at anchor. A severe gale arising in the night, the Castner dragged her anchor and the collision occurred. Signals were given from the Castner to move further off, but were not responded to by the libellant's vessel in time to prevent the accident. No movement was open to her except one which she made at great risk in the moment of collision. There seems to have been no fault on either side, except in the defendant vessel placing herself in the first instance too near the other.

CADWALADER, J.

There is no question that the Castner was in fault in getting too near the Mair and Cranmer. The only point raised by the defense is that the latter vessel ought afterwards to have moved so as to increase the distance between them, and thus avoid the danger. We do not know what was the course or velocity of the tide. But considering the velocity of the wind, the darkness of the night, and the bearing of Rainsford Island, the true question is whether the Mair and Cranmer could have made the movement suggested without some danger of encountering the island. If she might have done it, a further question would arise, whether her navigator, in the time which intervened before the collision, was bound, at his peril, to decide the former question. Here it is not immaterial to consider that there was no certainty of collision during the night if both vessels had remained where they were at the time when the Castner was finally anchored. The assessor thinks that the movement made by the Mair and Cranmer after the collision was one of extraordinary merit, and that, although it succeeded, there was no certainty of its success. He agrees with me in thinking that it was not a plain duty to make such a movement in the interval before the collision. If so, the decree must be for the libellant, with costs.

Decree accordingly.

DISTRICT COURT. SEPTEMBER 22, 1874.

ADMIRALTY.

THE ELVA DAVIS *v.* THE ANN BARTON.

When a vessel under the lee bow of another attempts to tack but misstays, the nautical rule is that such other vessel should not tack, but should luff the one point she has free, or put her helm "hard up," and should drop the peak of her main sail and let run the main sheet; otherwise, in case of collision, she alone is liable.

CADWALADER, J., said in entering a decree in favor of the Ann Barton, with costs in dismissing the libel, this case is one of the most important in principle that had ever been presented before him. The facts were these: The schooners Elva Davis and Ann Barton were both light bound from Boston to Philadelphia, and on the night of the 2d of November, 1872, were off the Massachusetts coast, between Chatham and Pollock's Rip Lights, the night being remarkably clear, so that the sails of both vessels could be seen at some distance. The wind was from the W. N. W. blowing briskly, with some sea running. The Davis was standing in on the starboard tack, heading S. W. by S., a point free. The Barton was on the port tack, heading N. by W., and close hauled, intending to go in and anchor under "Chatham Light." The vessels were sailing under converging courses, and must cross each other if they held their respective courses. The Barton, when about two hundred and fifty yards from the Davis, and under her lee bow, attempted to tack to the southward, but misstayed, fell off, and went astern. About this time the Davis tacked, but before she gathered headway, the collision occurred. The Court called to its assistance Captain John H. Young, nautical assessor. The Court concurred in the opinion of the assessor that, when the Davis found that the Barton misstayed, the Davis should have luffed the one point which she had free, or put her helm "hard up" and should have dropped the peak of her main sail, and let run the main sheet. The Davis would then have fallen off, her bow receding from the Barton more quickly than the Barton was coming astern, and no collision could have occurred. The effect of the tack-

ing on the part of the Davis placed her nearer the Barton and made the collision inevitable. The Davis was therefore alone responsible for the collision.

DISTRICT COURT. OCTOBER 2, 1874.

ADMIRALTY.

KNEE *v.* THE AMERICAN STEAMSHIP COMPANY.

The wages of seamen should follow promotion.

LIBEL for wages.

Libellant shipped on respondent's steamship Pennsylvania, at Philadelphia, June 25, and signed articles as "second pantryman" at $25 per month. When four or five days out at sea the chief steward put him in the place of the "second baker" who had proved incompetent, saying that the second baker had been disrated $10 per month, which would be added to his, libellant's, wages. The wages of the second baker were $30 per month. On arrival of vessel at Philadelphia, respondents offered to pay off libellant at the rate for which he shipped. This he refused and libelled for wages at the rate of $35 per month.

E. F. Pugh for libellant cited:

Schr. W. Martin, 1 Sprague 564.

The Exchange, 1 Blatch & Howard 366.

The Porcupine, 1 Hagg. 381.

The Providence, 1 Hagg. 391.

The Gondolier, 3 Hagg. 191.

The Arizambo, 1 Peters Ad. 251.

E. Wilson, Jr., and *H. G. Ward,* for respondents cited:

Harris Watson, Peakes Cases, 72.

Allen *v.* Hallett, Abb. Adm. 573.

CADWALADER, J., held that libellant having been advanced to a position, the wages of which were higher than those for which he signed articles, and having filled that position satisfactorily for the remainder of the voyage, he should have been paid off at the rate of the position to which he was advanced.

Decree accordingly for libellant for wages at rate of $30, with costs.

DISTRICT COURT. OCTOBER 2, 1874.

ADMIRALTY.

ZEHNER *v.* THE PHILADELPHIA & READING RAILROAD COMPANY.

Seamen's wages. Construction of articles. Measure of damages.

LIBEL for wages.

The libel alleged that libellants were shipped as firemen, etc., on board the respondent's steam collier, July 21, 1874, under shipping articles "from the port of Philadelphia to *Boston, Mass., and a port or ports on the coast of the United States for a term of two months* and return to Philadelphia *as often as practicable in the afore mentioned time.*" (The words in italics are written in the articles, the rest printed.) That the libellants had performed two voyages when they were, on the 18th day of August, discharged, without their consent, at the port of Philadelphia, for no cause except that the vessel was laid up on account of the depressed condition of the trade in which she was engaged. The libellants had been paid their wages up to that day, and now claimed pay for the remainder of the two months' term. The answer admitted the facts alleged, and denied the right of action.

The cause coming on for hearing on libel and answer.

Boudinot appeared for libellants.

A. D. Campbell for respondents.

THE COURT decreed for libellants, and ordered the amount to be ascertained by computing the difference between the agreed wages for the remainder of the term and the current rate at the time of discharge, and adding thereto the amount of wages and board of men for seven days; that period being apparently sufficient, in the state of the trade, to find other employment.

DISTRICT COURT. NOVEMBER 13, 1874.

ADMIRALTY.

DOUGHERTY *v.* THE AMERICAN STEAMSHIP COMPANY.

Seamen's wages. Penalty for illegal discharge. Unauthorized absence from vessel.

THIS was a libel for wages and damages.

Libellant shipped as a fireman on respondents' steamship "*Indiana*" at the wages of $50 per month, and signed articles on March 21, 1874, for a voyage from Philadelphia to Liverpool and return. The vessel was advertised to sail from Liverpool on April 15, at 11 A. M. Orders were given on the morning of April 14, that none of the crew should go ashore. Libellant left the vessel at about 4 o'clock in the afternoon of the 14th, and did not return until 9.30 in the evening, when he found that the vessel had gone out into the stream. The next morning he went out to the vessel in the tender that carried the steerage passengers, but he was prevented by the officers from coming on board.

Libellant was left for a week in Liverpool, during which time he failed to get employment, and in the end, had to work his passage home.

Respondents showed that a man had been shipped in libellant's place under the direction of the Surveyors of the Board of Trade before he came alongside of the tender; and that before the trial of the case they had tendered to libellant's counsel the amount of wages due libellant for the time of actual service.

Driver (with whom was *Coulston*), for libellant.
E. Wilson, Jr., and H. G. Ward, for respondents.

THE COURT decreed for libellant for his wages until the 15th of April, 1874, amounting to $41.66 and the additional sum of $10 for his damages, and half costs.

DISTRICT COURT. DECEMBER 24, 1874.

ADMIRALTY.

DURKEE, MASTER OF THE SHIP TANCOOK, *v.* WORKMAN & COMPANY.

Charter party. Construction of clause as to freight.

LIBEL for full freight.

STATEMENT OF THE CASE.

R. S. Carr, of Hamburg, Germany, chartered of libellant the ship Tancook, for a voyage thence to Philadelphia, with a cargo of empty refined petroleum barrels.

The charter party stipulated that on delivery of the cargo, according to bills of lading signed by him, libellant was "to be paid freight one shilling three pence British sterling in full for every barrel delivered . . . *and only half freight to be paid for all barrels delivered in a broken state.*"

Libellant received on board said vessel, at Hamburg, five thousand and seventy-one empty refined petroleum barrels, and gave bills of lading therefor, setting forth that the said barrels were "shipped in good order and well conditioned by the said R. S. Carr, and were to be delivered in the like good order and well conditioned at Philadelphia, unto order, he or they paying freight" at the rate aforesaid, "for every barrel delivered in good condition, *half freight for broken barrels.*"

The vessel having performed her voyage, was discharged at Philadelphia, and her cargo delivered to respondents as consignees.

The vessel delivered all the barrels, one thousand seven hundred and ninety-five being broken when landed. No evidence was given to show what part were broken on shipboard and what part were broken when shipped.

Libellant claimed to receive his full freight, averring that "broken barrels" in the charter party meant "barrels which might become broken in the course of transshipment;" and

that these barrels were not so broken, but were shipped in a broken condition at Hamburg.

Respondents paid full freight on the barrels which were unbroken, and half freight on the barrels delivered in a broken condition, claiming that the stipulation of "half freight for broken barrels" applied to all broken barrels received by the consignees, whether shipped in that condition or broken on the voyage.

Gormley, for libellant.

Henry, for respondents.

CADWALADER, J. It appearing that all except the disputed part of the libellant's demand has been paid since the libel was filed, it is dismissed as to the residue thereof. Half costs are allowed to the libellant.

The decree in this case was sustained by the Circuit Court on appeal. See the opinion of Judge McKennan in 2 Weekly Notes of Cases 431.

DISTRICT COURT. JANUARY 19, 1875.

ADMIRALTY.

BRUNSGAARD, MASTER OF SHIP PREMIER v. THE STEAM TUG AMERICA AND THE SHIP MAGDALENE.

Collision. Liability of following vessel.

LIBEL for damage by collision.

The facts were briefly these. On May 18th, 1874, about five o'clock P. M., the ship Premier, in tow of the tugs S. B. Jones and Levering, and the Magdalene, in tow of the tug America, left Gloucester Point and the Powder Wharf at Fort Mifflin respectively, both bound up the Schuylkill. The two tows, coming in converging lines, met at the mouth of the Schuylkill, the Premier being a little ahead.

The wind was moderate and in the west. The channel about 400 feet wide. The tide was ebb. The Premier, going about four knots, kept in towards the western shore, going up the

Schuylkill, and the America, with the Magdalene in tow, going about eight knots, also hugged the western shore, and overtaking the Premier, went between her and the western shore.

The tow line of the America was about 70 fathoms, that of the Premier about 40. The America passed the Premier, and had got abreast of the Premier's tugs, when the starboard bow of the Magdalene collided with the Premier a few feet aft of amidships, on the port side.

Upon the hearing it was the opinion of the nautical assessors that the America was in fault, having clearly infringed the well-known rule of navigation that the "vessel astern must look out for the vessel ahead and never pass to windward when in close proximity to such vessel."

THE COURT (CADWALADER, J.) approving their opinion entered a decree for libellant against the tug America.

DISTRICT COURT. FEBRUARY 6, 1875.

ADMIRALTY.

COSTELLO v. THE AMERICAN STEAMSHIP COMPANY.

Involuntary absence of a seaman from the vessel by reason of which she performed the remainder of her voyage without him, is not desertion, even when caused by his fault. In such a case he does not forfeit whole wages.

LIBELLANT shipped on respondents' steamship Illinois, April 16, at Philadelphia, for a voyage thence to Liverpool and back to Philadelphia.

The vessel arrived in Liverpool on April 27, 1874.

On the evening of April 28, libellant obtained leave to go ashore for 24 hours. While ashore he became intoxicated and was arrested by the Liverpool police and locked up in the station house.

In the meantime, on the night of April 30, the vessel hauled out into the stream, and at midday of May 1, libellant being

absent, the vessel sailed without him. Another man was shipped in his place, and he was logged a deserter.

As soon as released, libellant proceeded to the vessel and found that she had just started on her voyage, and he was unable to reach her. This was 12 o'clock M., of May 1.

He obtained a free passage home on the next vessel of the same line that sailed from Liverpool and on arriving in Philadelphia, claimed his wages up to the time of his leaving the vessel in Liverpool.

Respondent refused to pay him on the ground that the libellant having been forty-eight hours absent from the vessel without leave, and having been entered on the log as a deserter, had forfeited his wages under the Act of July 20, 1790.

Coulston, for libellant.

Morton P. Henry, for respondent.

CADWALADER, J., held that this was not a case of statutory desertion; but docked the libellant six or nine dollars from his wages, according to the date when his services began.

DISTRICT COURT. FEBRUARY 12, 1875.

ADMIRALTY.

DEARBORN *v.* THE BARQUE UNION, NORGRAVE, MASTER.

LIBEL for supplies furnished in New York to a vessel owned in Philadelphia. Sustained.

THIS was a libel filed on behalf of D. B. Dearborn, of New York, for funds advanced by the libellants for disbursements of the barque Union at the port of New York, in the fall of 1874.

The funds were advanced at the request of the master. The owner resided in Philadelphia.

The libel alleged that the moneys advanced were for necessary port charges at New York, including wages, wharfage, repairs, etc., and were furnished on the credit of the vessel.

A sight draft was drawn by the master in New York, on the owner's agents in Philadelphia, for the balance due libellant, shortly before sailing from New York for Philadelphia, payment of which was refused; and after arriving at Philadelphia the vessel was attached.

An answer was filed by the owner denying all knowledge of the claim, and excepting to the jurisdiction.

Henry and *Dixon*, for libellant.

F. C. Brewster, for respondent.

THE COURT (CADWALADER, J.) entered a decree for libellant for $364.81, being the full amount of claim with costs.

DISTRICT COURT. MARCH 12, 1875.

ADMIRALTY.

HENDERSON *v.* THE HANNAH M. BUELL.

Wages as a watchman on board a ship in port, not a subject of admiralty jurisdiction.

This was a libel *in rem* for wages, the libellant claiming to recover $357 for his wages as seaman, mate and second mate, from November 25, 1873 to October 19, 1874. During the first month of the period embraced in libellant's claim, he was employed as watchman on board the vessel while in the port of Philadelphia. On January 1st, 1874, he signed articles as seaman, afterwards as second mate and mate, and was discharged October 19, 1874.

Edmunds, for the libellant.

Coulston, for the respondents.

Libellant has no lien against the vessel for his services as watchman.

Per curiam. The Court is of opinion that it has no jurisdiction of the demand for watching, and refuses to entertain the same; and as to the residue of libellant's demand, awards him two hundred and eighty dollars, without costs.

Decree accordingly.

CIRCUIT COURT. MARCH 28, 1875.

EQUITY.

THE CENTENNIAL CATALOGUE COMPANY *v.* PORTER AND OTHERS.

Copyright is not assertable in a projected work.

BILL in Equity to restrain infringement of copyright.
MOTION for preliminary injunction.

STATEMENT OF THE CASE.

The bill set forth the creation of the United States Centennial Commission, and of the Board of Finance, by Acts of Congress of March 3, 1871, and June 1, 1872, with extensive corporate powers and privileges relating to the exhibition, and the publication by the commission of certain "General Regulations for Domestic and Foreign Exhibitors," by number XXVIII of which the sale of catalogues was reserved to the commission; that the commission have partly written and are causing to be written with as much expedition as possible, manuscripts of the official catalogue of the several departments of the exhibition; that on the 25th September, 1875, they deposited in the office of the Librarian of Congress the titles of separate books, in the following form:—

United States Centennial Commission
International Exhibition, 1876.
Official Catalogue of the Department of Mining, Metallurgy, Manufactures, Education and Science.
All rights reserved.
Philadelphia, 1876.

Together with similar titles for the departments of Agriculture, Horticulture, Machinery and Art; the rights whereof they claimed as proprietors under the copyright laws of the United States; that on November 1st, 1875, the Centennial Board of Finance, with the consent of the commission, granted the ex-

clusive right of publishing said catalogues which have been already printed by complainants.

The bill averred that the defendants intend to publish the "American Centennial Directory or Catalogue," comprising a list of exhibitors, etc., that the names of said exhibitors cannot without fraud and collusion be obtained except from the catalogue of complainants, the information being exclusively in the commission. The defendants were interrogated whether information to prepare their list of exhibitors could be obtained except in a surreptitious manner and whether the commission did not reserve such information for the exclusive use of the commissioners and their assigns; and the bill prayed *inter alia;* an injunction restraining the defendants from publishing "The American Centennial Directory or Catalogue," or any other book whatever, containing a list of exhibitors at the Centennial Exhibition of 1876.

The answer denied the power of the Board of Finance to make any contract excluding others from publishing catalogues compiled from original sources of information, and, in answer to the interrogatory of the complainants, averred that the information could be and had been obtained without resorting to surreptitious means, denying that the commission or Board of Finance could reserve matter of general interest or of public news so as to grant exclusive concessions for the publication of the same, since in the Acts of Congress creating the commission power is given to enforce regulations for their own government within the grounds or buildings, but none to exclude the public from legitimate business outside the grounds. It also alleged, that the earliest copyrights relating to catalogues of the Centennial Exhibition were granted to two of the defendants on the 28th August, 1875, and the 23d September, 1875, and that the latter had registered in November, 1875, a trade mark for "The American Centennial Directory or Catalogue."

J. E. Shaw, for complainants.

Although the company's publication is partly in manuscript, still the copyright act covers it.

[CADWALADER, J. Do you mean to say that you can copyright an unprinted work?]

Undoubtedly. The book is now in a form called a dummy, *i. e.*, a book containing a few printed leaves followed by several blank.

[CADWALADER, J., You are not now in a condition to make such a book as you show in your application. Your contention is that copyright is applicable to an inchoate and intended production of an author. This is new to me. Assuming that a manuscript could be copyrighted, the question is whether it must not be in a form in which it is to be printed. There is another difficulty here. You have no copyright in the subject, but only in the work.]

The information is exclusively ours.

[CADWALADER, J. If it is anything but literary piracy your remedy is in the State Courts. There is no remedy here, until it comes to infringement of literary property. Here you go upon the ground of literary property, not in print and only partly in manuscript.]

We do not claim as a general proposition that subject matter open to all the world may be copyrighted, but we do claim that this particular case is exceptional because the information from which alone a catalogue can be prepared has been expressly reserved to the commission and their assigns, and all exhibitors and visitors are made subject to the reservation by the published regulations. Our objection is to the publication by the defendants of a list of leading exhibitors.

[CADWALADER, J. The mere threat to print your material is not definite enough to give the Court jurisdiction.]

We are within sections 4964 and 4970 Revised Statutes.

[CADWALADER, J. The act says a book, but not an *intended* book. You must show that this is a book, a literary composition within the meaning of the act.]

We maintain that by taking the initiatory steps, by recording the title, we became entitled to protection, citing—*2 Morgan's Law of Literature 232. Pulte v. Derby,* 5 *McLean, 332. Roberts v. Myers, 13 Mo. Law Rep., 401. Boucicault v. Wood,*

2 Bissell's Rep., 34. Abernethy v. Hutchinson, 1 Hall and Twells' Chan. Rep. 28. Prince Albert v. Strange, 2 De G. and M. 674. The Congressional Librarian in his pamphlet of instructions declares that a copyright may be secured for a projected as well as for a completed work.

[CADWALADER, J. That gives color to your argument, but the jurisdiction of this Court is only over printed matter.]

Further the managers of the exhibition have a right to make rules controlling their own exhibition.

CADWALADER, J. There must of course be a right of control, subject, nevertheless, to the reasonable rights of the public, but of that this Court does not take cognizance. It is extremely doubtful whether the copyright in this case is valid from having been too soon asserted.

Huey, Vaux and *Arnold, contra,* were not called on.

Injunction refused.

CIRCUIT COURT. APRIL 22, 1875.

EQUITY.

McCULLOCH *et al. v.* TAYLOR *et al.*

The acceptor of bills drawn under the usual forms of commercial letters of credit can compel the holder of the letter to furnish funds to meet the acceptances: and a debt due by the issuer of the letter to the holder cannot be set off against this obligation.

This case was heard on bill, answer, and proofs. The bill averred the existence, prior to 18th September, 1873, of two firms, viz., Jay Cooke & Co., and Jay Cooke, McCulloch & Co., doing business as bankers in Philadelphia and London respectively. The firms were in no way connected, except that a number of persons (not including the complainants) were members of both firms. The complainants were the only members of the firm of Jay Cooke, McCulloch & Co., who were not also members of the other firm. During 1873 Jay Cooke & Co. issued to the defendants, N. & G. Taylor Co., several commercial

letters of credit for £10,000 each, drawn on Jay Cooke, McCulloch & Co.

The letters of credit were in the following form:

No. Philadelphia, 187

Sir—We hereby authorize you or such parties as you may direct to value on Messrs. Jay Cooke, McCulloch & Co., of London, in drafts at four months to the extent of ten thousand pounds (£10,000) for account of N. & G. Taylor, drafts to be drawn in within six months from this date for the cost of tin plates to be exported to an Atlantic port in the United States, and advice thereof to be given to Messrs. Jay Cooke, McCulloch & Co., accompanied by certified invoices, consul's certificates, policies of insurance, and bills of lading to order of Jay Cooke & Co.

Insurance in order in

We hereby agree with the drawers, endorsers and bona fide holders of bills drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation at the Counting House of Messrs. Jay Cooke, McCulloch & Co. in London.

Very truly yours,

Accompanying each of these documents was a receipt in the following form:—

New York, 187

"Received from Messrs. Jay Cooke & Co. the letter of credit, of which annexed is a copy, in consideration whereof we hereby agree to provide them with sufficient and satisfactory funds to meet the payment of all bills drawn under it twenty days before the maturity of the same in London, respectively, either in cash at their drawing rate, or in bankers' bills, payable at not exceeding sixty days sight in London, endorsed by us and approved by them, it being understood that they may decline any bills, however good, at their discretion. We also agree to give security for the same at any time if required by the said Jay Cooke & Co.; and further, that all property purchased under the said Credit, and the proceeds thereof, together with the poli-

cies of insurance thereon (which we agree to effect) and the bills of lading are hereby pledged and hypothecated to Jay Cooke & Co., and Jay Cooke, McCulloch & Co., as collateral security for the fulfilment of this contract, and are held subject to their order, with authority to take possession and dispose of the same at discretion for account of whom it may concern, charging all expenses, including commission for sale and guarantee, and applying the proceeds for their security or reimbursement. And we further pledge, as security for any other indebtedness of our firm to Jay Cooke & Co., or Jay Cooke, McCulloch & Co., or any surplus that may remain either in the property or the proceeds thereof after providing for the acceptances under said Credit. On all drafts drawn under the said Credit we agree to pay one per cent. commission, and interest at five per cent., or the Bank of England rate if higher. We further authorize you to cancel the said Credit at any time to the extent it shall not have been acted upon when notice of revocation is received by the user. This obligation is to continue in force notwithstanding any changes in the individuals composing either of the firms parties to this contract, or in that of the user of the Credit."

These receipts were signed by the defendants. Under these letters goods were purchased and bills drawn on Jay Cooke, McCulloch & Co., which were accepted and paid at maturity by them. On 18th September, 1873, Jay Cooke & Co. stopped payment, and were on 26th November, 1873, adjudicated bankrupts. Up to that time N. & G. Taylor Co. had made payments to Jay Cooke & Co. pursuant to their engagement to meet the bills drawn under the letters of credit. On the day of the suspension of Jay Cooke & Co. there was outstanding a letter of credit, under which bills had been drawn and accepted by Jay Cooke, McCulloch & Co., and together amounting to £22,-678.19.7 sterling over and above the amounts that had before that date had been paid to Jay Cooke & Co. by N. & G. Taylor Co.; there was also due for commissions £226.15.10 sterling, and £9.17 for stamps. For the sum of £22,678.19.7, Jay Cooke, McCulloch & Co. had made themselves liable by accept-

ing bills drawn under the letters of credit, and N. & G. Taylor Co. had not paid Jay Cooke & Co., or Jay Cooke, McCulloch & Co., anything on account of the same.

After the suspension of Jay Cooke & Co., and in anticipation of the bankruptcy that ensued, that firm believing that the equitable right to be paid for the amount advanced under the letters of credit was in Jay Cooke, McCulloch & Co., who had agreed to make the advances, and who alone were competent to carry out their contract, and who ultimately did so by paying their acceptances, consented, at the instance of the agent of Jay Cooke, McCulloch & Co., to hand over the documents to Drexel & Co., as agents of Jay Cooke, McCulloch & Co., to collect the balance due or to become due from N. & G. Taylor Co., under their contracts above set forth.

In September, 1873, after the suspension of Jay Cooke & Co., two of the consignments of goods purchased under the letters of credit arrived, the goods were consigned, according to the agreement, to Jay Cooke & Co. as collateral security for the performance by N. & G. Taylor Co. of their contract to provide funds.

These bills of lading were handed over to the Messrs. Taylor Co. upon their signing a contract in this form, one on the 24th and the other on the 29th of September, 1873.

PHILADELPHIA, Sept. 29, 1873.

"Received from Hugh McCulloch, Philadelphia, the merchandise specified in the bill of lading, per Pennsylvania, dated 10th of Sept. 1873.

. . . . 1207 boxes tin plates . . . . and in consideration thereof, we hereby agree to hold said goods in trust, with liberty to sell the same, and in case of sale, to hand the avails, as soon as received, to Hugh McCulloch, as security for due provision for the acceptances of Jay Cooke, McCulloch & Co., of London, on our account, noted at foot; and we further pledge to them said goods, and proceeds thereof, as security for the payment of any other indebtedness of ourselves to Hugh McCulloch, or Jay Cooke, McCulloch & Co. We further agree to keep said prop-

erty insured against fire, payable in case of loss, to Hugh McCulloch, with the understanding that they are not to be chargeable with any expenses incurred thereon, the intention of this arrangement being to protect and preserve, unimpaired, the lien of Hugh McCulloch, and Jay Cooke, McCulloch & Co., on said property.

N. & G. TAYLOR CO."

After the delivery to them of these goods, as above, N. & G. Taylor Co. continued to make payments to Drexel & Co., as agents of Jay Cooke, McCulloch & Co., of the amounts they were bound to pay on their contracts, and these were all made after the adjudication of Jay Cooke & Co. as bankrupts. The proceeds of the goods received were more than enough to pay the claims of complainants. The bill prayed for discovery, and that a decree should be made ascertaining complainants' right to receive the amount due by defendants as against any claim by the assignee in bankruptcy of Jay Cooke & Co. The material facts alleged in the answer were as follows: They had been in the habit of transacting business which required the payment of large sums annually in England and Scotland. When the exact amount of these payments was made known to defendants they purchased sight drafts from Jay Cooke & Co. on Jay Cooke, McCulloch & Co., paying for them as received. But where they did not know the exact amount required they bought of Jay Cooke & Co. the right of drawing on Jay Cooke, McCulloch & Co. any amount which they might require, and this was done through the medium of the open letters of credit alluded to in the bill. Defendants drew drafts on Jay Cooke, McCulloch & Co. by virtue of these open letters, having, at the time of purchasing the latter agreed to pay Jay Cooke & Co., at Philadelphia, in U. S. currency, the equivalent of each draft drawn, twenty days before maturity thereof in London, with one per cent. commission. When Jay Cooke & Co. stopped payment, defendants did not know that there existed any probability of insolvency. Defendants denied that Jay Cooke, McCulloch & Co. were either alone competent to carry out their contracts

in regard to the drafts in question, or that they actually did so by paying their acceptances, except to the extent of £2761. 13*s.* 4*d.* The acceptances were paid through Jay Cooke, McCulloch & Co. by defendants, who supplied the funds in each case a short time before the acceptance became due. On 18th September, 1873, there was out a sight draft of Jay Cooke & Co. on Jay Cooke, McCulloch & Co. for £ 2264. 7*s.* 11*d.* for which defendants had paid Jay Cooke & Co. in full; and there were three open letters of credit, as aforesaid, each for £10,000, for which they had agreed to pay Jay Cooke & Co., in Philadelphia, twenty days before the maturity in London of each draft drawn thereunder. On receiving the bills of lading for each lot of merchandise, defendants had signed to Jay Cooke & Co. a printed receipt, identical with the one set forth above, under date of 29th September, 1873, except that the name of Jay Cooke & Co. was printed therein wherever the name of Hugh McCulloch occurs in the above receipt. On the arrival of the *Pennsylvania,* 23d September, 1873, defendants, for their own protection, called on Jay Cooke & Co. for the purpose of stopping *in transitu* such merchandise as had been consigned to Jay Cooke & Co. for them. They were informed that Jay Cooke & Co. were solvent; that the bills of lading had been transferred to Hugh McCulloch and were held for him by Drexel & Co.; that all acceptances would be paid by Jay Cooke, McCulloch & Co., by which firm the draft for £2264. 7*s.* 11 *d.* would also be accepted and paid. As the indebtedness of defendants on the drafts drawn on Jay Cooke, McCulloch & Co. matured (after the 18th September, 1873), defendants bought drafts of Drexel & Co., and sent them to Jay Cooke, McCulloch & Co. to be applied to the payment of the particular acceptances about to mature, describing them specifically. Defendants understood when sending them that said drafts were so endorsed that they could not be used except to pay the specific acceptances then becoming due. The said draft for £2264. 7*s.* 11 *d.* was actually protested for non-payment on the 23d September, 1873. It remains still unpaid. Defendants had paid for all drafts drawn on Jay Cooke, McCulloch & Co. before the same

matured, including commissions, etc., excepting the sum of £2761. 13*s.* 4*d.* on the last draft drawn by them, from which amount they claimed that they had a right to deduct the amount of the draft of Jay Cooke & Co., aforesaid, for which they had paid Jay Cooke & Co. They admitted that they would be liable to the latter £2761 13*s.* 4*d.*, provided the last mentioned draft had been paid.

Sydney Biddle and *McMurtrie,* for complainants.

This transaction is simply an agreement by one firm (Jay Cooke & Co.) that another firm (Jay Cooke, McCulloch & Co.) shall accept drafts drawn on them by the defendants, for a profit of one per cent. to be divided between the firms.

Defendants agree to supply funds to meet the acceptances before they become due. The agency of Jay Cooke & Co. in the matter was merely to pledge themselves for the reliability of the defendants. The contract was this: The English firm agreed to accept drafts for defendants, provided they were assured of the latter's credit. The American firm assumed the responsibility of assuring the credit of defendants, and the latter agreed to supply the English firm with the necessary funds to meet the acceptances before they matured. It is merely a loan of their credit by the two banking firms to defendants, who are liable to the English firm for the amount of their drafts. The latter can resort either to them or to the American firm. As the firms are entirely distinct, there is no set-off possible. The American firm, in receiving funds from defendants to meet the latter's drafts, were the agents of the English firm.

Fallon, contra.

This was a contract made entirely between defendants and Jay Cooke & Co. They knew Jay Cooke, McCulloch & Co. in the transaction solely as agents of the former. The letter of credit was the basis of the whole transaction. That was purchased from defendants, Jay Cooke & Co. exclusively. Jay Cooke & Co. contracted that they should be supplied with certain credit, for which they were to pay Jay Cooke & Co. Defendants would have been liable on a breach of their contract to the Philadelphia firm, not the London firm, and *vice*

versâ. They were, therefore, entitled to deduct the amount of the Philadelphia firm's indebtedness to them on the unpaid draft from their debt to the latter. As for the commissions, complainants could in no case claim commissions from defendants, and would have been entitled to but half thereof from Jay Cooke & Co.

McMurtrie, in reply, was restricted to the question of commissions.

CADWALADER, J. [to defendant's counsel]. Do you deny that the drafts have been paid by the English firm?

Fallon. Yes. The drafts were paid by the defendants through the English firm, to whom defendants' other drafts were specially endorsed payable to the particular drafts in question.

PER CURIAM. But as to the balance?

Fallon. As to that we have a set-off, as our contract to furnish funds is with Jay Cooke & Co. alone.

CADWALADER, J.: "McCulloch possesses proof of payment in holding the drafts, and could recover in an action of *assumpsit* for money paid for defendants. If he had not paid the drafts he could recover on the ground of his liability thereon for having accepted them." MCKENNAN, J.: "This is a very simple question. It was merely a loan by Jay Cooke, McCulloch & Co. of their credit to defendants for a commission. Defendants cannot set off their claims against Jay Cooke & Co. I think complainants are only entitled to half commissions."

Decree accordingly.

CIRCUIT COURT. APRIL 24, 1875.

NEGLIGENCE.

HOPE *v.* EASTERN TRANSPORTATION LINE

Negligence, contributory. Barge in tow under command of captain of tug. Whether owner or commander of barge, leaving it without orders, or refusing to return under apprehension for his life by reason of stress of weather, constitutes contributory negligence. What proof on *voir dire* necessary to allow commission to be read.

MOTION for a rule for new trial.

This was an action of trespass on the case tried before McKENNAN, J., for damages resulting from the loss of plaintiff's barge by reason, as was alleged, of the carelessness and want of skill of the captain of defendant's tug boat, which was towing the barge up Long Island Sound.

The plaintiff proved, on trial, that defendant's tug was towing three barges, one of which was plaintiff's, all abreast, and that, owing to roughness of weather, the captain of the tug began to let the barges out so as to tow them one behind the other, and that this latter method was the safest in bad weather. While doing so plaintiff's barge became detached from the tug, by the breaking of a hawser, and plaintiff and his bowsman, the only two people on board their barge, jumped from it on to the tug without any orders to do so.

On behalf of defendants, the captain of the tug testified that he ordered the plaintiff, Hope, to go with him in a yawl on board the barge, to try to save her, which plaintiff, under apprehension of danger, refused to do; that the captain himself then went with one of his crew and remained on plaintiff's barge, occupied in efforts to save her, fifteen minutes, according to plaintiff's testimony, and forty-five minutes, according to his own. The boat sank, and the defendant's captain testified that he believed that if plaintiff and his bowsman had not left the boat the barge would not have been lost.

The plaintiff in rebuttal said that he did not recollect having been ordered by the captain to board his barge with him.

One of the defendant's points was that "it was the duty of the plaintiff and his bowsman to aid in managing and conducting his boat, and go on board of it when he was directed to do so by the captain of the tug; and if when he was directed to go on board of his own boat to assist in managing her he refused to do so, and his failure to do so contributed in any degree to cause the loss, the plaintiff cannot recover in any case, even though the defendant may not have used proper care and diligence." This point was affirmed with the following qualification: "If the plaintiff declined to obey an order of the

master of the tug, and his refusal contributed to the loss, he cannot recover. But if the jury is satisfied that at the time an order was given to him, he was justified in an apprehension that his life would be endangered by obeying it, he was not bound to incur that hazard, and his omission to obey it would not condone the defendant's negligence."

Defendants offered to read the deposition of a witness taken under a commission to New York. This was objected to on the ground that search for him had not been proved and that his alleged residence was in Jersey City, within a hundred miles of Philadelphia. Defendants on *voir dire* proved by their counsel that his clerk had gone out with a list of witnesses, among whom was this one, and had returned and told the counsel that this one was not in Jersey City, and could not be found, as he was away in his boat. He lived in his boat, but stayed in Jersey City when he was on land. Objection sustained. Exception.

Verdict for plaintiff for $2125.30.

Sydney Biddle (*George Biddle* was with him) for motion, now moved for a rule, *nisi*.

The effect of the answer given to defendants' point was that even if the jury believed defendants' testimony, viz., that the loss would not have occurred but for plaintiff's negligence in leaving and refusing to return to his barge, yet if he had a reasonable ground to apprehend that his life was in danger he was relieved from the duty of obeying the orders given by the captain of the tug. This substitutes the judgment of one who, for certain purposes, is as one of the crew, for that of the captain. All discipline must necessarily be destroyed by such a construction of the law. The apprehension was shown to be baseless by plaintiff's own statement, for he admitted having been on board the tug at least fifteen minutes after the tug's captain was on board his barge, and before she went down.

As to the exclusion of the deposition the burden of proof is on the party objecting.

Ridgway *v.* Ghequier, 1 Cranch's C. C. 4.

Coulston, for plaintiff, was not heard on this motion.

Motion refused, CADWALADER, J., saying that he took no part in the decision, but considered the first point as exceedingly important.

DISTRICT COURT. JUNE 17, 1875.

ADMIRALTY.

THE STEAMSHIP TONAWANDA.

The enactment by Congress (Rev. St., Section 4234) that every sail-vessel shall, on the approach of any steam-vessel during the night time, show a lighted torch upon that point or quarter to which such steam-vessel shall be approaching, does not apply in every case in which a steamer and a sailing vessel may pass near to each other.

Where the proximate cause of the collision of a steamer with a schooner was a mistaken movement of the steamer after the schooner's green light had been sighted, the steamer was condemned as responsible for the whole damage sustained by the schooner, though no torchlight had been shown by her, the lookout from each vessel having been insufficient.

A LIBEL on behalf of the owners of the schooner H. P. Blaisdell against the steamship Tonawanda, belonging to the Philadelphia and Southern Mail Steamship Company, in a cause of collision. There was also a petition of intervention on behalf of the Insurance Company of North America, insurers of certain locomotive engines on board the schooner at the time of the collision. The steamer filed an answer and also a cross libel against the schooner.

STATEMENT OF THE CASE.

The collision took place about twenty miles off Cape Hatteras on the 10th of May, 1875, at half past two o'clock A. M. The steamer was heading north and the schooner south by east, close hauled. The steamer struck the schooner's head just abaft the main rigging, sinking her almost immediately. The differences between the courses of the steamship and the schooner were one point, or about eleven degrees, at which angle the vessels were approaching each other. There was a southwest wind blowing, a haze on the water almost masthead

high, but clear overhead. The schooner was sighted from the steamer ahead and a little off the port bow. The steamer was sighted from the schooner about two points off the starboard bow. The master of the schooner first made out a steamer's white light; went into his cabin and got his night glasses and returned to the deck and made out the three lights of the steamer, after which the lookout reported the steamer's light to him. The master went again to the cabin for his torch, which was in the locker, returned to the deck, ordered the wheel hard starboard, and threw down his torch without lighting it.

The nautical assessor reported as follows: June 14, 1875. In the matter of the Schooner "H. P. Blaisdell *v.* Steamer Tonawanda," I am satisfied that a poor lookout was kept on board of both vessels; this seems to be verified by the mate of the steamer "Wyoming," (belonging to the same company), who saw the Tonawanda's light fifteen minutes before they came up with each other. Now, as they were going nine knots each, or coming together at the rate of eighteen knots, this would give the distance at which the Tonawanda's light could be seen as not less than four and one-half miles.

The schooner should have seen the steamer's light before her lights were visible to the Tonawanda. The captain of the schooner, when first seeing the bright light of the steamer, thought it was from one-third to one-half a mile distant. Now, under this impression, there was no necessity for doing anything at all, as the schooner would have passed far clear of the steamer. The captain got the "night glass" to make sure that he was correct, and during this elapsed time, he found, on discerning the red and green lights, that the steamer was in much closer proximity than he had supposed; he then got the flash-light, but too late. Now, although he should have shown the flash, yet I do not think that the showing it would have prevented the collision.

Had there been a good lookout on board the Tonawanda, she would have seen the schooner's green light in time to have avoided any confusion on board the steamer, as there appar-

ently was in giving the order to hard-a-port, which would have been quite correct had it been a white natural light, but the report of the "lookout" was "green" light ahead. *This was repeated.* The only evolution with this report of green light ahead, was for the steamer to "hard-a-starboard," and I assert *that no possible contingency* could place two vessels in such a position—*"green light ahead"* that would *admit of any other than putting the wheel to starboard* on the steamer. How the mate who was in charge of the deck at the time could have made so great a blunder (he is a man of undoubted experience and ability) is a mystery to me. The captain made an attempt to correct the error of the mate, by endeavoring to change the wheel to starboard, but too late. The blunder of the mate can only be accounted for by the impression made on his mind from the captain saying it was about time for them to see the New York steamers, and under this impression the order to "hard-a-port" was given. Another blunder was that the bell "to stop" was not rung until the instant of the collision, for the engineer says (in the log) "bell rung to stop at same time I felt the shock."

In steamers navigating the American coast too much carelessness is practiced in *not* making frequent signals with the steam whistle in foggy or hazy weather or unfavorable nights. The whistle is so readily available that no possible excuse can be presented for the neglect thereof. The schooner did right in putting her wheel to starboard, as her captain knew that the approaching steamer, seeing his green light, must starboard her wheel *under all circumstances* and pass "green to green." The captain of the schooner states that his starboarding did not cause her to fall off much, yet I feel confident she did fall off far enough to bring her at right angles with the steamer, but, under the dreadful excitement of the moment the captain did not notice the change.

He therefore concluded that the Tonawanda was in fault: 1st, for an indifferent "lookout," 2d, in going at full speed in the then condition of the atmosphere and also in not stopping before the order to "hard-a-port" was given, 3d and principally, if not wholly, in porting the wheel instead of starboarding.

1875, June 15. The assessor said, "An important reason suggests itself to my mind (which I overlooked yesterday) as more clearly showing the blunder made by the mate of the Tonawanda in porting the wheel. For instance, suppose he did think that the light was that of a steamer, he could not tell *from the mere seeing the 'bright light'* how that steamer was steering, and consequently should not have moved the wheel at all until the 'green and red' became visible, as those lights are intended expressly to show how the vessel is going. I think this very important as the respondents endeavored to show that porting the wheel was the right, if not the only movement the Tonawanda could make."

On the subject of flash-lights the assessor said, "there are many cases in which showing the 'flash' is entirely unnecessary; for instance, seeing a vessel in close proximity, either to the windward or to leeward, going either in the same or the opposite direction, crossing the bow or stern, the captains being fully aware of their relative positions, *with the colored lights in sight,* indicating the course steered, I say that under such a state of facts the necessity for showing the 'flash' does not exist. Again, there are many cases in which it is altogether impossible to show the 'flash' or any other naked light; for instance, in blowing, or wet, or very bad weather, the torch cannot be lighted on deck, having to depend on the ordinary matches for that purpose. The writer has been obliged frequently to resort to the cabin lamp for lighting the 'flash' after ineffectual attempts to light it on deck, thereby losing many precious minutes, which might have led to most disastrous consequences."

Edward F. Pugh and *James B. Roney,* for the schooner.

Richard C. McMurtrie for the insurance company.

Henry R. Edmunds and *Morton P. Henry,* for the steamship.

CADWALADER, J.

The immediate cause of the disaster was the mistake in porting, instead of starboarding, the wheel of the steamer. That the light which had been discerned from her was the schooner's

green light, appears not only from the testimony of the man upon the lookout in the steamer, but likewise from the subsequent conduct of the master of the steamer. Almost instantly, but too late to remedy the evil, he endeavored to change the wheel to starboard, in order to correct the mistake. This effort he would not have made unless he had known that it was the green light which he had seen. So I should think, and so the assessor informs me.

The proximate cause having thus been ascertained, secondary questions arise from the two-fold consideration that the steamer and the schoner were each in fault in not keeping a proper lookout. How does this apply to the vessels respectively?

If the schooner had been discerned in time from the steamer, the mental "confusion," to which the assessor attributes the blunder of porting instead of starboarding, would not have occurred. This only confirms the conclusion which has otherwise been reached, that the steamer was in fault.

The remaining question is whether the schooner was also in fault in such wise that she must answer for half the damages. The argument against the schooner is, that if the steamer had been discerned in time, the flash of the schooner's torch could have been exhibited soon enough to have warned the steamer.

There is no reason to doubt, that if she had been thus warned in season, the collision would not have occurred. This gives an imposing aspect to the argument. But the true question is, whether, assuming that the torchlight ought to have been shown the omission to show it was contributory, as a proximate cause to the collision.

It was contended in argument that the enactment of Congress requiring a sailing vessel in certain cases to exhibit such a flash-light, was equivalent to the requirement, as to a steamer, that she shall have a white light. But the comparison fails in several respects. The torch which burns out in two or three minutes, and is relighted by hand, cannot exhibit a fixed and continuous uniform indication like a steamer's white light. Moreover, the white light is ordinarily discernible before the

steamer's red or green light can be seen. The Act of Congress, on the contrary, does not, in ordinary cases, require the torch light to be shown till after the red or green light shall have been seen. Nor does the act require the exhibition of such a light in every case of a sailing vessel and a steamer passing near to each other. The enactment is, that "every sail-vessel shall, on the *approach* of any steam vessel, during the night time, show a lighted torch upon that *point or quarter* to which such steam vessel shall be *approaching*." Certainly, if the lights are red to red, or green to green, this enactment does not apply, because, although the vessels may pass near to each other, the steamer is not, in either case, *approaching*, in a nautical sense, on any *point or quarter*. She is not *approaching*, within the words or meaning of the act, but is on a course to pass clear.

It is not necessary to define all those other cases in which the enactment may or may not apply, or to consider how far it may, in such respects, be interpretable with reference to prior usages of navigation as to torch lights. Nor is it necessary to inquire whether it would have been the duty of the schooner to flash her torch at any given distance, if there had been a proper lookout from her, and the steamer had been discerned at the proper time.

The reason that these questions do not require consideration, is, that in the case which actually occurred, the insufficiency of the lookout, if it was in any respect a cause of *danger*, was not a proximate cause of the *disaster*. The sole cause to which the collision is properly attributable, was the mistaken movement of the steamer.

The question thus decided is between the two vessels. Whether any different or modified question might arise in a proceeding against the schooner at the suit of the owners of her cargo, cannot be determined upon the present state of the record.

The steamer alone is condemned as responsible for the whole damage.

DISTRICT COURT. JULY 16, 1875.

ADMIRALTY.

PETERS *v.* MARTENS.

Excessive punishment of seaman by master is not excused because erroneously authorized by consul. Insubordination by steward, an educated man, is a greater offence than by an ordinary mariner. Damages.

STATEMENT OF THE CASE.

THIS was the complaint of Captain Henry Peters, of the ship "Limerick Lass," an American vessel, against J. G. Martens, steward of said vessel, setting forth charges of insubordination against the latter. The defendant was brought to this port in irons from Bremerhaven, under consular orders. The testimony on the part of the captain showed that the steward was drunk several times, had used offensive language and struck the captain. In the testimony of the steward it was admitted that he was drunk once, that he had asked permission to go to Hamburg, while in Bremerhaven, that the captain granted him permission, but warned him that he would be considered a deserter if he went, and that he chose to remain on board. The Consul at Bremerhaven ordered the steward to be brought to the United States for trial. He was in irons during the voyage home, which lasted forty-five days.

Criminal proceedings were begun, and the defendant was bound over by a United States Commissioner for trial. Immediately thereafter, the United States District Attorney, under Act of Congress, 11 June, 1864 (Revised Statutes 835 Sec. 4300), investigated the case, and, being of the opinion that it should be summarily tried, reported the same to CADWALADER, J. When the case was called for trial a complaint was filed by the United States District Attorney, to which the defendant pleaded not guilty.

It was then agreed by counsel on both sides, that the cause should be heard on the testimony taken before the commissioner with the same effect as if a libel and answer had been filed *in personam* in admiralty for personal damages. It was also

agreed to refer all question of wages to the Court. Either party to be at liberty to file such libel *in rem* or *in personam* as may be necessary to give retrospective effect to said Judge's opinion as a decree.

Coulston, for the complainant, argued that the master had acted under the instructions of the Consul in all that he did, and that under the Act of 1872 (Revised Statutes 898 Sec. 4600*), enlarged and extensive powers were given to Consuls.

Neal, contra, relied on the testimony presented.

CADWALADER, J., said that no citizen of this or any other country, of the intelligence required to command a vessel, could be excused for the ignorance implied in the defence of the master of this vessel, supposing him to have acquiesced in the flagrant error of the Consul. The whole offence here was the occasional insubordination of the steward while more or less intoxicated at a time when the vessel was in port. No crime has been shown that in any manner imperilled the discipline of the ship. The master could have lawfully put him in irons for a day or two. But that a Consul should confine a man for two months in irons for such an offence, is too gross a violation of natural right to be excusable in the supposed authority of a Consul or master. If the injured party were of the grade of mariners of the lower and uneducated class, I should give larger damages, but the steward is an educated man, and therefore, I think his want of subordination exceeds what would be palliated from the ignorance of a man less educated.

Decree for libellant for the full amount of wages due him, to wit, $153.68 and $120 damages with costs.

* The section authorizes consular officers to reclaim deserters and discountenance insubordination by every means within their power, and in all cases of apprehension of deserters to inquire into the facts.

DISTRICT COURT. SEPTEMBER 10, 1875.

ADMIRALTY.

GERMOND *v.* THE ANTHRACITE INSURANCE COMPANY.

Insurance upon advances. Insurer of a debt liable only to extent that the *res*, as a security, is impaired by the peril insured against. No contribution for general average in insurance on advances.

THIS was an action upon a policy of insurance for $4,500, effected by libellant upon advances valued at the sum insured upon the barque Irma, from Baltimore to Aspinwall, in which the libellant claimed for a total loss.

The vessel sailed from Baltimore, and becoming disabled put into Nassau, where she remained for over four months. The master being unable to obtain funds to continue the voyage, the barque sailed for New York under a bottomry bond for $4,500, given to secure a debt incurred for temporary repairs and the expenses of the vessel while at Nassau, for non-payment of which she was under proceedings instituted under the Nassau bottomry bond, and sold at marshal's sale in New York, for $1,350. A reference to commissioners was had, who reported that the amount of expenses incurred for sea damages, included in the bottomry bond, was $2,000, and that the contribution in general average, payable by the vessel for the detention in the port of necessity, was $896, making a total sum payable by the vessel, $2,896.

Coulston, for libellant, argued that this was an abandonment of the voyage, and that the sale under the bottomry bond at New York, constituted a technical total loss, and, the Insurance Company having neglected to take up the bottomry bond, the whole amount of the policy should be paid by the respondents; that respondents had acted as insurers upon the hull and had placed themselves in the predicament of accepting an abandonment, although an actual abandonment by libellant was impossible, and cited:

Arnold on Mar. Ins. 944.

Bradlie *v.* Maryland Ins. Co., 12 Peters, 378.

Da Costa *v.* Newham, 27 T. R. 407.

Henry, contra, contended that there was no total loss, as there was no abandonment, nor would the sale, by reason of the failure of the owner to furnish funds for the vessel, at Nassau, change a partial to a total loss.

Am. Ins. Co. *v* Ogden, 20 Wendell, 287.

The utmost extent to which liability attaches under this policy was for sea damages sustained by the vessel. The insurer of a debt was liable only to the extent that the *res* as a security is impaired by the perils insured against.

1 Parsons Marine Ins. 229.

Smith *v.* Columbia Ins. Co., 17 Pa. St. 253.

The general average charges upon the hull cannot be considered in an insurance upon advances also; otherwise in adjusting a loss, in addition to the known contributory interests of hull, freight and cargo, it would be necessary to add another interest, that of lien creditors, whose debt has been preserved by such expenditures, for which there is no authority, and which would render adjustments too uncertain.

CADWALADER, J., was of opinion that no question of contribution, under the name of general average, or otherwise, arose in this case, and decreed for the amount of the sea damage as reported by the commissioners. $2,000 with interest.

Decree accordingly.

CIRCUIT COURT. OCTOBER 4, 1875.

EQUITY.

THE CONSOLIDATED FRUIT AND JAR COMPANY *v.* DORFLINGER.

The patentee of an alleged invention for which his patent is invalid cannot acquire an exclusive right in any trademark which would have a tendency to mislead the public by inducing a false belief that the subject of it is, in whole or in part, protected by the patent.

BILL to restrain use of trade marks.

The bill alleged that in and subsequent to the year 1858, their assignor, one Mason, was the inventor and patentee of several improvements in air-tight glass bottles; that in carrying on an extensive manufacture of the patented articles said

Mason and his assignees had used the words *Mason's Patents, Nov.* 30, 1858, and *Mason's Improved,* as trademarks, and had in 1871 duly registered the latter mark in the Patent Office. The bill further alleged the great value of said trade marks, and charged infringements by defendants by their use of the above or substantially similar titles, and prayed discovery, an injunction, and an account of profits.

The answer, *inter alia,* denied that the defendants had used the mark *Mason's Improved,* and averred that *Mason's Patent* of November 30th, 1858, had been declared invalid by the United States Circuit Court for the Southern District of New York, which latter fact was admitted by the complainants upon the argument.

Duncan and *Latrobe* for the complainants cited:
Leather Cloth Co. *v.* Am. Leather Co., 11 Jur. (N. S.) 513.
Partridge *v.* Mench, 2 Barb. Ch. 101.
Ainsworth *v.* Walmesley, 44 L. T. R. 252.
Edelsten *v.* Vick, 18 Jur. 7.
Sykes *v.* Sykes, 3 B. & C. 541.
Howe *v.* Howe Machine Co., 50 Barb., 236.
Filley *v.* Fassett, 44 Mo. 175.
Rowley *v.* Houghten, 2 Brewster, 303.
Minir and *Shaw* for the defendants cited:
Upton on trademarks 10.
Pidding *v.* Howe, 8 Sim., 447.
Perry *v.* Trufitt, 6 Beav., 66.
Flavell *v.* Harrison, 19 Eng. L. & E. 15.
Fetridge *v.* Wells, 4 Abb. P. Rep. 144.
Samuels *v.* Berger, Id. 88.
Burgess *v.* Burgess, 17 Eng. L. & E. 257.
Hardy *v.* Cutter, 3 Pat. offi. Gaz. 468.
Marshall *v.* Ross, L. R. 8 Eq. 651.

CADWALADER, J.

The complainants deduce their asserted right under Mason, who was the patentee of certain alleged improvements in fruit jars. There has been a judicial decision against the validity

of his patent; and they do not now assert its validity. But they claim a trademark in what I think is not sufficiently distinguishable from a claim of exclusive right in the patented privilege. In other words the alleged trade mark is either deceptively obscure, or purports to be for the subject of the patent, or to include it. These remarks apply, whether the trademark is claimed in the words "*Mason's Patent, November* 30th, 1858," or in the words "*Mason's Improved,*" or in the words, "*The Mason Jar of* 1858," or any substantially similar form of words. If there had not been a patent a different import might perhaps be attributable to the second and third of the forms of words which have been quoted. But when the question is considered with reference to the pre-existence of a patent to Mason, these expressions are to be understood as applying to it, or as including the subject of it.

The patentee of an alleged invention, in consideration of the exclusive privilege granted to him for a limited period, is bound to disclose fully his secret; and is understood as dedicating the supposed invention to the public, subject to the supposed exclusive privilege. If the privilege is invalid, the dedication is immediate, and absolute. It has, therefore, been contended that the rights of the public ought to be protected against any subsequent assertion by the patentee of an independent right under the name of a *trademark*.

This objection to the complainant's alleged right would prevail, if it covered the whole of the question. But it does not. The answer to the objection is, that a tradesman who has an invalid patent, may nevertheless rightfully use the subject of the patent himself, and that he ought, in that case, to be protected against injury by others, who falsely impose their goods on the public as his own. Upon this view of the subject, the case of Sykes *v.* Sykes (3 B. & C. 541; 5 D. & R. 292), was decided in the year 1824. It is a decision apparently in favor of the complainants here. It was hastily considered on a motion for a new trial, a rule to show cause being refused. But there was no defect in the reasoning on the point upon which, alone, it was decided.

Another objection, however, to the complainants' bill, does not admit, in reason, of the same answer. This objection is, that no title can be successfully asserted in a trademark, which is of a tendency to mislead or deceive the public. This objection may avail a defendant, notwithstanding what would otherwise be imputable to him as misconduct. The doctrine is, that the complainants must come into a Court of Equity with clean hands: (4 De G., J. & S. 149). This doctrine, if applicable alike at law, was overlooked in the case of Sykes *v.* Sykes.

The direct application of the objection appears when we consider that the alleged trademark in question tends rationally to induce a belief that the subject of it is a securely patented invention of Mason, whereas, it has been judicially decided that he never had a valid patent for it as an invention.

In cases prior to 1863, before English Vice-Chancellors, the authority of Sykes *v.* Sykes could not be disregarded, and there was great hesitation in holding directly that a trademark representing an article as patented, when in fact it was not securely protected by a patent, was invalid in equity. Thus, Vice-Chancellor Wood, afterwards Lord Hatherly, in 1853, intimated an opinion that the trademark would be invalid where no patent had ever existed: (Flavel *v.* Harrison, 10 Hare, 467); but afterwards, in the same year, when considering the case of a patent which had expired, suggested some qualification of the general doctrine: Edelsten *v.* Vick, 11 Hare, 86, 87; compare with Morgan *v.* McAdam (36 L. J. Ch. 229, 231). But such doubts or hesitations were removed in England by the case of the Leather Cloth Co. *v.* The American Leather Cloth Co., in the House of Lords in 1865 (11 H. L. 523), affirming a decree made by Lord Chancellor Westbury, in 1863 (4 De G., J. & S. 137. In this case Lord Kingsdown said: "If a trademark represents an article as *protected by a patent,* when in fact it is *not so protected,* it seems to me that such a statement prima facie amounts to a misrepresentation of an important fact, which would disentitle the owner of the trademark to relief in a Court of Equity against any one

who pirated it;" and added, that he would have great difficulty in assenting to the distinction suggested by Vice-Chancellor Wood in the case which has been cited: (11 H. L. 543, 544). Lord Kingsdown here succinctly restated the opinion of Lord Westbury, in the Court of Chancery; and Lord Westbury adhered to it in the Court of Appeal. (p. 548.)

An exception from this rule of decision had been previously and has been since, recognized in the case of an article such as *patent leather,* or *patent thread,* whose designation of this kind is in constant use, though no one supposes that it is thereby intended to convey the impression that the subject is protected by any patent: (Marshall *v.* Ross, Law Rep. 8 Eq. 652, 653). So after a patent privilege is long since expired, such a designation may have become a general or special word of art: (Hall *v.* Burrows, 4 De G., J. & S. 155). But such exceptions only confirm the rule of decision in ordinary cases.

Lord Westbury in the Court of Chancery (4 De G., J. & S. 138, 139), seems to have had American decisions in view. His opinion appears to have been followed in the Patent Office of the United States. If other American opinions are conflicting, it may, perhaps, be attributable to undue deference to the supposed authority of Sykes *v.* Sykes. If there be such a conflict, the question is too doubtful for interlocutory adjudication.

The above observations may not be applicable to the alleged trademark in the words "*The Mason Jar of* 1872." The complainants, if so advised, may renew their application as to this mark. But a man is perhaps not at liberty to flood the market with various designations, all including more or less of a common subject, without making the differences very distinct. How this may be as to the particular subject here, I cannot at present decide.

As to the other alleged trademarks, a preliminary injunction is refused.

NOTE. See Ford *v.* Foster, 27 L. T. R., N. S. 219 (1872). Ford had for many years sold an unpatented shirt, under the name of *Ford's Eureka Shirt,* and falsely described it in adver-

tisements and invoices (but not in the trademark), as patented. Foster subsequently used the trademark *Foster, Poster & Co.'s Improved Eureka.* BACON, V. C., having refused an injunction, on appeal JAMES and MELLISH, L. JJ., granted a perpetual injunction, holding (*a*) that though the complainant had falsely represented himself to be the patentee of the shirt, yet, as this was in a thing distinct from the trademark, the latter should be protected by injunction; (*b*) that the word *Eureka* was not *publicis juris;* (*c*) that the imitation of the complainant's trademark was substantial and injurious. JAMES, L. J., commenting on Sykes *v.* Sykes, *supra,* said: "I am of opinion that probably it would be held at law that if the trademark itself contains a false representation, no action could be maintained; and so also if the trade was a fraudulent trade, I have no doubt that no action could be maintained." See *Good-will* 14 Am. Law Reg., N. S. 649. (November 1875.)

DISTRICT COURT. OCTOBER 29, 1875

ADMIRALTY.

HOPE AND OTHERS *v.* RAILROAD TIES.

Quære. Has a Court of Admiralty jurisdiction *in rem* of a claim for damages against a cargo in the hands of a purchaser without notice at the port of delivery, for detention caused at the port of shipment by the shipper and then owner in the absence of a stipulation for demurrage in the contract of affreightment.

LIBEL in a cause of affreightment and damages for detention.

STATEMENT OF THE CASE.

Stewart residing in Virginia, wanted barges to carry railroad ties from Cat Point, in that State, to Philadelphia. These barges were sent to him by Twibill, who owned one of them and represented the owners of the others, without any charter party or other contract of affreightment. They were detained, while loading, beyond what was claimed to be the usual and customary time necessary for their loading. At that time

the shipper was the owner of the ties. The master of the barges signed bills of lading for their respective cargoes without any memorandum being made upon them of the detention. Upon the arrival of the vessels at Philadelphia, a claim was made for the detention, the cargo in the meantime having been sold and the bill of lading transferred to a purchaser in Philadelphia without notice of the claim for detention. The libellants attached the cargo after its discharge for the freight and damages for the detention; but the damages were the real question.

It was claimed by the counsel for the respondents that aside from the question of fact as set out in their answer, there was no jurisdiction *in rem* against the cargo in the hands of the purchaser without notice at the port of delivery, for detention caused at the port of shipment by the shipper and then owner, in the absence of a stipulation for demurrage in the contract of affreightment.

The case was decided upon the facts only; but the inclination of the Court was to the view of the law entertained by the counsel for the respondent. And so, in this district, the law is now understood to be.

Mr. Coulston, for the libellants; *Mr. Edmunds,* for the respondents.

CADWALADER, J.

Independently of the question of jurisdiction, the libellants have not, on the proofs, made out a case upon which there could be a safe decision in their favor.

They do not appear to have sufficiently informed themselves beforehand of the local difficulties of the business in which they engaged.

The effect of the evidence on their part, if none had been adduced on the other side, might perhaps have been that about six days were lost in Virginia through neglect to have, at the place of intended shipment, those ties which were afterwards brought to it by ox-carts from Warsaw. But the evidence for the defence indicates that there was only space at the so-called

wharf for loading one barge at a time, and it appears that the quantity of ties there, at and after the arrival of the barges, was always greater than the barges in succession could receive on board.

As to the time alleged to have been lost at Philadelphia, it is impossible to discriminate satisfactorily between delay which might have occurred from the absence of railroad cars to receive the ties, and the delay which occurred through the requirement by the libellants of security for the so-called demurrage in Virginia. It seems, however, that so soon as there was an absolute readiness to make the delivery at Philadelphia, there was no difficulty or delay in receiving the cargo.

On the whole, the case of the libellants fails upon the facts; and it is not necessary to consider the point of law as to jurisdiction.

DISTRICT COURT. NOVEMBER 5, 1875.

ADMIRALTY.

KIRKPATRICK *v.* THE AMERICAN STEAMSHIP COMPANY.

Shipping. Bill of lading. Construction of clause providing for shipment, if prevented from any cause, on a succeeding vessel of the same line.

LIBEL and answer.

STATEMENT.

The libel set forth that the libellant being desirous of shipping sixty-two rolls of leather to consignees in Liverpool, on the 30th June, 1875, delivered to respondents at their wharf in Philadelphia, the said goods, and requested them to forward the same by the steamship Indiana, a vessel of respondents' line, then freighting for a voyage from Philadelphia to Liverpool and advertised to sail on July 1st, 1875. Respondents, having agreed to transport the goods as requested, gave to libellants a bill of lading, but instead of shipping the leather on

board the Indiana, withheld it until the following week, without the knowledge of the libellants and then put it on board the Abbotsford, another vessel of their line, which set sail for Liverpool on July 8th. The Abbotsford was lost at sea in a fog off Wylfa Head, on the Welsh coast, together with all the cargo, including the leather belonging to the libellants.

The answer admitted the facts of the contract with the libellants, the shipment of the goods on the Abbotsford, and the loss of that steamer and her cargo, and set up in defence a stipulation in the bill of lading delivered to the libellants, which reads as follows:

> In case the whole or any part of the goods specified herein be prevented by any cause from going in said ship, the ship owner is only bound to forward them by succeeding ships of this line.

The answer then averred that the steamship Indiana completed her full cargo without being able to take on board the articles intended to be shipped by libellant, and that in consequence thereof, and under the terms set forth in the contract, the libellant's goods were forwarded by the next succeeding vessel of the same line, viz., the steamship Abbotsford.

Coulston for the libellant.

The bill of lading being an absolute contract to ship the goods by the Indiana, any shipment upon another vessel without notice to libellant is a violation of the contract by respondents and renders them liable as insurers against all loss from whatever cause.

Bazin *v.* Steamship Co., 3 Wall. p. 238.

[CADWALADER, J. That case is clearly distinguishable. There the bill of lading read " . . . failing shipment by her, then by the first steamship sailing after that date," and the respondents shipped by a vessel which sailed a week *before* the time provided for the sailing of the ship by which the goods were originally to have been carried.]

To defend successfully under the stipulation respondents should aver that they were prevented from carrying the goods upon the Indiana by some sufficient cause of which the libel-

lant was notified. Otherwise any insurance obtained by the owners upon the goods as shipped by the Indiana could have been vitiated by the transportation in a different vessel.

M. P. Henry, for the respondents.

There can be no doubt as to the interpretation of the clause in the bill of lading and under it the action of the company was entirely justifiable.

[CADWALADER, J. Does not the exception in the bill of lading refer to cases where for some reason transshipment becomes necessary after the goods have been originally loaded, so as to authorize the carrier to transship to a subsequent vessel of the same line instead of sending by the first vessel?]

The averments of the answer came within the words "any cause" in the stipulation. The clause is beneficial to the shipper as it enables him to obtain the advantage of a bill of lading which he can draw against immediately upon his delivery of the goods to the carrier, which would otherwise be impracticable.

CADWALADER, J.

This case was argued upon a libel and answer, and having been considered the respondents are allowed, if so advised, to amend their answer. If it shall not be amended before the next stated session of the Court on the 12th inst., a decree will be entered by the clerk for libellant. In giving leave to amend, the Court will not be understood as intimating that the present answer does not sufficiently and properly raise the true question to be decided between the parties.

November 12. The respondents having declined to amend —decree for libellant.

And afterwards on December 21, 1875, the amount due the libellant was assessed at $1,945.45 with costs.

DISTRICT COURT. NOVEMBER 26, 1875.

INTERNAL REVENUE.

THE UNITED STATES *v.* RHAWN.

1. The law under which the National banks are incorporated does not exempt them from examination by the Internal Revenue Officers mentioned in Section 3177 of the Revised Statutes.

2. A clerk of a Supervisor of Internal Revenue is, however, not such an officer.

DEBT by the United States against William H. Rhawn, president of the National Bank of the Republic, to recover the penalty prescribed by section 3177 of the Revised Statutes. The section reads as follows:

> Any collector, deputy collector, or inspector may enter, in the day time, any building or place where any articles or objects subject to tax are made, produced, and kept within his district, so far as it may be necessary for the purpose of examining said articles and objects. And any owner, etc., who refuses to admit such officer or to suffer him to examine such articles or objects, shall for every such refusal, forfeit $500.

On the trial it was proved by the plaintiff that one Tutton, supervisor of internal revenue for this district, had applied to the defendant for permission to examine the cheques of the banks customers in order to ascertain if they were properly stamped. Rhawn had refused to permit such examination until he had conferred with counsel. The supervisor then applied for advice to the Secretary of the Treasury, who affirmed the visitorial power claimed by him. Tutton again requested Rhawn to allow him to make the desired examination of the cheques and was again refused; whereupon he brought this suit in the name of the United States for the recovery of the penalty of $500.

The defendant thereupon proved that he had been advised by counsel that officers of internal revenue had no visitorial powers over the national banks, such powers being vested solely in the Controller of the Currency and his commissioners by section 5241 of the Revised Statutes, viz:

No Association shall be subject to any visitorial powers other than such as are authorized by this title ("National Banks") or are vested in the Courts of Justice.

Valentine, district attorney, for the plaintiff.

Internal revenue officers have visitorial powers vested in them by section 3177, Revised Statutes, and the supervisor is especially vested with this power by section 3163, Revised Statutes, which, after describing the duties of this officer, provides that "he shall have power to examine all persons, books, papers, accounts and premises."

Pancoast, contra, contended that section 3177, Revised Statutes, being a reproduction of the Act of 30th June, 1864, section 37 restricted the visitorial powers of revenue officers to those classes of buildings mentioned in the latter act, viz., "breweries, distilleries and manufactories," and that by section 5241 visitorial powers over national banks were conferred solely on the Controller of the Currency, citing and producing the record of United States *v.* Parkhill. See note *infra.*

CADWALADER, J., instructed the jury as follows:

Section 3177 of Revised Statutes of the United States enacts, that any collector, deputy collector, or inspector, may enter in the day time any building or place where any articles or objects subject to tax are * * * kept within his district, so far as it may be necessary for the purpose of examining said article or articles, and that any owner or person having the agency or superintendence of such building or place, who refuses to suffer such officer to examine such article or articles, shall for every such refusal forfeit five hundred dollars. Section 3163 enacts, that every supervisor, under the direction of the commissioner, shall see that all laws and regulations relating to the collection of internal taxes, are faithfully executed and complied with, &c.

The present suit is to recover $500, a penalty alleged to have been incurred by the defendant, who is president of a national bank, by refusing to suffer a person who was acting under the direction of Mr. Tutton, the Supervisor of Internal Revenue,

to examine such cheques of customers of the bank as were kept in it, in order to discover whether any, and which of them were unstamped, contrary to the provisions of the internal revenue law upon the subject.

It is alleged that there was an application to the defendant, to suffer such an examination to be made, and that the defendant refused to suffer this to be done.

The defendant contends that the revenue officer had no right to make the examination requested. The ground of this contention is, that the law under which the National banks are incorporated provides for the occasional examination of their affairs, and for reports of their condition to the Controller of the Currency, and enacts, that they shall not be subject to any visitorial powers other than are authorized by the act, or are vested in the courts of justice.

These banks are fiscal agents of the government of the United States, and it would be most extraordinary that Congress should have exempted their customers from a necessary and proper scrutiny under the revenue laws in a matter which has no legitimate connection whatever with the affairs of the banks. As to the position thus taken by the defence, I am of the opinion that it is wholly unreasonable and unfounded in law. If you believe the testimony of Mr. Tutton, he told the defendant that there was no desire or intention to examine into the affairs of the bank, or the accounts of its customers, and stated that the sole purpose was to ascertain whether cheques in its keeping were unstamped.

If unstamped they were subject to tax under the revenue law.

The visitorial powers over a corporation are the subject of a distinct head under the law of corporations. The examination of such cheques under the revenue law is not the exercise of a visitorial power under the Act of Congress relative to the banks. This part of the defence, therefore, fails in law.

It appears, however, that the person who asked to make the examination in this case was a clerk to the supervisor. Such a person is not an officer within the meaning of the law. The

words of section 3177 are, "any collector, deputy collector or inspector;" and a clerk to the supervisor is not included in this description.

If the supervisor was himself authorized to make such an examination, he could not delegate this power to his clerk.

Your verdict should therefore, for this reason, be for the defendant.

Verdict and judgment for defendant.

NOTE. The same question arose in the United States *v.* Parkhill, cashier of the Monongahela National Bank of Brownsville, Pa. (No. 14, May Term 1875, U. S. District Court for the Western District of Pennsylvania). In this case the defendant refused to allow a *deputy* collector of internal revenue, to examine the bank's cheques. On the trial the district judge directed the jury to find a verdict *pro forma* for the plaintiff, subject to the opinion of the Court upon the question of law, whether, under the Acts of Congress, visitorial powers over national banks are conferred upon internal revenue officers.

June 15, 1875, upon the argument on the point reserved, *Reed,* for plaintiff, contended that such powers were vested in revenue officers by section 3177, Revised Statutes, and that section 5241, Revised Statutes did not exclude them therefrom.

Sweitzer, for the defendant, argued that these two propositions; (1) That section 37 of the Act of 30th June, 1864. Revised Statutes section 3177, did not in terms, or by fair implication, extend to, or include National banks; (2) That National banks are protected by a positive statute against any other visitorial powers than such as are authorized by the National Bank Act, and such as are vested in courts of law and chancery.

THE COURT MCCANDLESS, DISTRICT J. (MCKENNAN, Circuit J. sitting as assessor and concurring) ordered judgment to be entered for the defendant upon the point reserved.

DISTRICT COURT. DECEMBER 15, 1875.

ADMIRALTY.

CORSON *v.* THE MORNING STAR.

A vessel left for repairs at a ship yard was taken away by the owners without payment for the repairs, or a tender thereof. The libel contained no specific averment of lien, but set forth the facts merely. The facts having been established the Court entertained the libel on the ground of a tortious abstraction of the vessel.

LIBEL in a cause of possession.

On the libel appears the following endorsement: "1875, January 1. The ground of this libel is a tortious abstraction of the vessel from the rightful possession of the libellant, Eliza Corson, in navigable waters. On this ground alone it is allowed." J. C., judge.

The libel was originally filed by the agent of the party who made the repairs.

CADWALADER, J.

This case was heard upon the libel plea and answer and proofs and was argued by counsel.

Whereupon the libellant is allowed to amend the libel by making it one at the suit of Anna Eliza Corson, which amendment is made.

The libellant is also allowed to amend, if so advised, by referring to the laws of the State of Pennsylvania on the subject of the lien upon vessels for work done or materials found or provided in the repairing, &c., of the same.

Upon the libel as framed, with or without the latter amendment, the Court is of opinion that the principle stated in the memorandum of 1st January, 1875, endorsed on the libel, applies to the case. Whether the libellant's bill of charges was too high is, on this point, immaterial, because the debtor never made any tender, formal or informal, of any part of the amount.

If the libellant had absolutely agreed that the vessel might leave for Norfolk, or if any equitable right of a charterer or shipper had intervened, a question whether the lien had been

waived for such a voyage, or had been suspended until her return from it, might have required consideration. But no right of any third person is in question; and, as between the parties litigant, it would be absurd to suppose that the libellant meant that the vessel might get a freight without any settlement with him; or without at least giving him a pledge of the freight, or of some part of it, in place of his lien.

The case is referred to George P. Rich, Esquire, as commissioner, to ascertain and report the amount due to the libellant.

DISTRICT COURT. JANUARY 8, 1876.

ADMIRALTY.

THE SCHOONER MARIAN GAGE *v.* THE STEAMER ACHILLES.

1. It is a duty to keep an uninterrupted lookout and in a collision the responsibility is upon the vessel on which it has been shown that there has been a failure in this particular.

2. The measure of damages for a vessel totally destroyed in a collision is the cost at which the loss could be supplied; or it is the price a prudent owner wishing, but not compelled, to sell, would reasonably expect, and would probably be able, to get, within a reasonable time at public or private sale without forcing the sale, and using proper means to avoid undue sacrifice.

COLLISION.

The collision occurred at three and a half A. M. of August 28th, 1875, in Delaware bay, and resulted in the immediate sinking of the schooner with loss of vessel and valuable cargo of coal. The Reading Railroad Company intervened for the steamship and filed the answer, which alleged absence of lights and lookout on the schooner as the cause of the disaster. The responsible cause is indicated in the opinion of the Court. On the coming in of the supplemental report of the assessors the decree was for the libellants.

CADWALADER, J.

This case furnishes perhaps an example, in addition to many which have occurred, of the danger of occasional interruptions

of the regular duty of the man on the lookout, and of substituting, for a short interval, the officer of the deck, who is, or ought to be, giving his attention at the same time to other duties. Whether this irregularity was, in the particular case, the cause of the insufficiency of the lookout from the steamer is not necessary inquiry. Whatever may have been the cause, there is no doubt of the fact that there was an insufficient lookout, and that the disaster would not have otherwise occurred. With reference on the one hand to the mistiness of the atmosphere and on the other hand to the fact that lights were sighted at distances of about a mile, I have asked an assessor's opinion how far off the schooner at anchor should have been discerned if she had had no anchor light. He answers that her hull should have been seen from the steamer at a distance of at least a quarter of a mile. It is not necessary to consider the correctness of this opinion, because, according to the weight of the evidence, the schooner's anchor light was burning until it was extinguished by the shock of the collision. I think it also reasonable to believe from the testimony, that her light had been actually discerned from the steamer, but mistaken for something else. In all this, the assessor concurs. I have, however, asked him to make a full report of his reasons.

Jan. 9, 1876.

The preceding opinion was followed by one in the same case, on the question of damages.

CADWALADER, J.

None of the witnesses on either side appears to have had, in his mind, a right standard for estimating the value of this vessel in August, 1875. The true question is what price a prudent owner wishing, but not compelled, to sell, would reasonably expect to get, and would probably be able to get, within a reasonable time, at public or private sale, without forcing the sale, and using proper measures to avoid undue sacrifice. The mistakes in the varying standards of the several

witnesses examined are such as usually occur on such questions. There is ordinarily no difficulty in making such a judicial comparison of their testimony as to arrive at a satisfactory conclusion. In this case the witnesses of the libellant, or some of them, were brought in cross-examination to express what if it stood alone, might import that they applied the right standard. But this conformity seems to me rather apparent than real. The witnesses for the defendant seem generally to have testified under the notion of the standard of a forced sale, by auction at an unfavorable time; such a forced sale would not be a fair test of value. Nevertheless we cannot wholly reject it in the comparison of all the testimony.

Another mode of defining the standard would be to inquire at what cost her loss could have been supplied, that is to say, what price would the libellant have been obliged to pay, in order to obtain at this, or any other northern or neighboring southern port of the United States, a vessel of about the same bulk, age and goodness.

I think that her value may be fairly estimated at seventeen thousand, five hundred dollars.

The decree will be for this amount, varied by the adjustment of the account as to other items which will probably be undisputed.

CIRCUIT COURT. JANUARY 10, 1876.

EQUITY.

HANCOCK *v.* THE WILMINGTON & READING RAILROAD COMPANY.

1. The lien of a mortgage is from the time of its recording as against the lien of a contractor for work and material.

2. As between the mortgagee and the contractor there is no lien by the contractor for unearned profits; there is a lien for expenses caused by the mortgagor's delay.

3. Payments should be first applied to that part of the demand which is unsecured by lien.

EXCEPTIONS to the Master's report upon the claim of Alexander P. Fulton.

STATEMENT OF THE CASE.

A fund arising from the sale of property of an insolvent railroad corporation by commissioners who had been agreed upon by the parties and appointed by the Court, a Master was appointed to distribute the same.

Alexander P. Fulton was a claimant under a contract for construction of the road. He had at a previous stage of the controversy agreed to refer his claim to the engineer of the road, whose report had been accepted by all parties, but as to the meaning and extent of which there existed a difference of opinion. It was afterwards specially referred by the Court to the Master.

The claim embraced compensation for work done and materials furnished under the original contract, and for extra work and materials under subsequent modifications; also a claim in the nature of damages for expenses incurred and prospective and unearned profits lost to claimant by default of the company.

After the date of the contract the company executed a mortgage. It was a question of some doubt whether the commencement of the work preceded the date of the mortgage; but it was clear that it preceded the recording thereof.

Some payments had been made on account by the company.

The report of the Master was favorable to the claimant on all the points. Exceptions to his findings were filed.

AUBREY H. SMITH, Master.
William E. Barber, for Fulton.
Charles Hart and *Chapman Biddle,* for the commissioners.

CADWALADER, J.

The mortgage took effect from the time of recording it, and not from its date. The claimant therefore had the prior lien. As between him and the mortgagees, the certificate of the engineer is, however, of no avail for the purposes and to the extent contended for. Nor can the claimant's lien be sus-

tained as to a demand for mere loss of profits which he was prevented from earning. But what he and the engineer have considered such a loss of profits appears to have included, to some extent, extra work actually performed under the contract, as the specifications were incidentally modified. The claimant has also, I think, in equity, a right of lien for an increase of charge upon him arising from delay which under another head was caused by the defendants. It is probable that the sum of these amounts rightly estimated, would have been considerably less than the amount certified by the engineer as due for what he considered loss of profits. But the settlement made conformably to that certificate bound the railroad company from their adoption of it; and the subsequent payments by them have reduced the claimant's demand to a present balance less than the amount for which his lien would have been originally sustainable. On the question of the proper appropriation of the payments, I am of opinion that they should be applied, in the first instance, to that part of his whole demand against the company which was unsecured by the lien in question.

If these views are correct he has a valid lien to the extent of his present demand; considering it established, the Court directs that the commissioners have leave to pay it.

The funds in Court are applicable to the discharge of it as a lien prior to the mortgage. The amount with interest will therefore be paid by the clerk out of the moneys in the registry of the Court.

February 8, 1876.

SAME *v.* SAME.

Even where the ground of jurisdiction of the affairs of a railroad corporation by the Circuit Court is the avoidance of the evils of partial and injurious sales by the Courts of several States, it will not interpose to prevent a sale under a judgment obtained *bona fide* in one of those States. It will favor arrangements made to prevent such sales.

PETITION of Brinton King.

STATEMENT.

The company defendant was a consolidation of two distinct railroads, one in Pennsylvania, the other in Delaware, chartered respectively by the legislatures of those States. It became insolvent and a bill was filed by the complainant, Hancock and others of the bondholders. One of the grounds on which equitable interference was asked was that suits were pending against the original corporations in each of the two States, and in one instance, execution in the hands of the sheriff, and that, to avoid a sacrifice, the whole road could only be sold lawfully under the concurrent action of Courts of competent jurisdiction in the two States.

The petitioner King was the owner of land in Chester County, Pennsylvania, which had been taken by the company for "sidings" and for which damages had been awarded in the sum of $990. His claim was afterward reduced to judgment in the Common Pleas of Chester County.

Talbot and *Windle,* for petitioner.
Charles Hart, for respondents.

CADWALADER, J.

This case having been heard and considered upon the petition of the above named Brinton King, and the proofs adduced in support of the same, and argued by counsel, the Court is of opinion that the petitioner should have leave to proceed by execution or otherwise, as he may be advised, to enforce his demands for the amount liquidated by the judgment in Chester County unless the commissioners now in charge of the railroad under the appointment of this Court, shall ask leave to pay the same out of the moneys in their hands, or in the Registry of this Court, upon receiving a transfer of all rights, liens and securities, legal and equitable, of the said petitioner.

And thereupon the said commissioners by their solicitors and counsel, Mr. C. Hart and Mr. Chapman Biddle, give the Court to understand that they are ready and willing and desirous that the said demand shall be paid out of the said moneys

in Court on receiving such a transfer; and Mr. L. Waln Smith, for certain first mortgage bondholders and Mr. McPhenon for the Baltimore, Philadelphia & New York Railroad Company, uniting in the request for the order hereinafter made.

It is ordered that on the execution of such a transfer the said demand be paid out of the funds in Court.

CIRCUIT COURT. FEBRUARY 8, 1876.

EQUITY.

BIRD *v.* THE PENN MUTUAL LIFE INSURANCE COMPANY.

1. A life insurance for a year was effected in 1847 at a certain premium, with the privilege of continuing the insurance from year to year on payment of a premium of equal amount before the end of each year; and it was provided that if any annual premium should not be paid within the time limited, the insurers should not be liable to pay the sum insured, and the policy should determine. The insured paid the premiums yearly till 1861. He was an inhabitant of Virginia. The insurers were incorporated by the Legislature of Pennsylvania, in which State their business was transacted. The Civil War which broke out in 1861 disabled them from receiving, and the insured from paying, the premiums in that year and until 1865. Upon the termination of hostilities, he inquired of them by letter what steps he must take to continue his insurance. They answered that it was forfeited for non-payment of the premium in 1861, and that it would not be revived by them. *Held,* that this answer dispensed with an actual tender of the premiums, and that the question of his right to continue the insurance ought to be decided as if he had tendered them with interest.

2. It seems that a Court of Equity should relieve him against the forfeiture, and reinstate him in the insurance on his making compensation by payment of all the premiums with interest on each.

3. Life insurance distinguished, as to such a question, from fire insurance.

4. *Quære,* whether his representatives would have been relievable if he had died before the end of the Civil War, so that his option to continue the insurance could not have been exercised before the absolute termination of the risk insured against.

5. The cases of the Mutual Life Insurance Co. *v.* Hamilton, and Tait *v.* The New York Life Insurance Co., (in each of which the Judges of the Supreme Court of the United States were equally divided in opinion) considered.

BILL for re-instatement of policy of life insurance.

STATEMENT OF THE CASE.

The defendants are a Mutual Insurance Company incorporated by the Legislature of Pennsylvania by a charter under which they carry on their business in the city of Philadelphia. In September, 1847, they executed and delivered to the complainant at Philadelphia, a sealed policy of insurance in $5,000 upon his life, payable to his wife. The premium paid was $155.50. The insurance was for a year, with the privilege of continuing it from year to year on payment of a premium of equal amount before the end of each year. The policy contained a provision that if the assured should not make the annual payments on or before the several days appointed, then, and in every such case, the defendants should not be liable to the payment of the sum insured or any part thereof, and the policy should cease and determine, and all previous payments made thereon, and all profits for which scrip should not have been issued, should be forfeited to the defendants.

The complainant continued to pay the annual premiums punctually at Philadelphia until 1861, when the whole sum thus paid had amounted to $2,177. He was a resident of the State of Virginia. The civil war, which broke out in April, 1861, prevented him from paying the premiums in September, 1861, and subsequently; and made it unlawful for the defendants to receive any such payment during the continuance of the hostilities.

The defendants, from time to time, declared certain dividends, payable to their policy holders. In the year 1859, the complainant had borrowed from the defendants $600, when they took from him the policy and a pledge of the accrued and accruing dividends as their security for the loan. At various times he made payments on account of this loan until it was reduced, in the spring of 1861, to $250, for which balance they held his note payable on 27th April, 1861. The defendants, being in possession of the policy, treated the insurance as ended by reason of the non-payment of the premium in September, 1861; and wrote upon the policy that it

was "forfeited" and "cancelled," obliterating the signatures of their officers. In 1862 they closed his account on their books by crediting on account of the note, $52.73, which was due to him on their deposit book, and applying $210 of the dividends accrued, to the payment of the balance of the note, with interest. This left in their hands about $620 of dividends unpaid. Independently of any question as to the termination of the insurance, the further dividends on the policy from January, 1862, to January, 1866, would have been about $320, making in the whole about $940, after deducting the $210.

On the termination of the hostilities, the complainant, by a letter of 31st May, 1865, inquired of the defendants whether any profits of his life insurance were in their hands and also expressed a desire to know what steps he must take to continue his insurance. On 9th June, 1865, they wrote in answer stating that on the former account they held $620, subject to his order; and added: "the policy of insurance was forfeited for non-payment of premiums of 1861, and will not now be revived by the company." In a subsequent correspondence the complainant contended that the defendants ought to have applied the dividends in payment of accruing premiums. The defendants insisted that the insurance was absolutely forfeited, and, throughout the correspondence, treated the dividends as a distinct matter. In October, 1866, the account as to the dividends prior to the civil war was settled by the complainant with the defendants on the footing dictated by them. He thereupon received from them on this account $591.20. In the following year, he renewed the correspondence, urging his right to be reinstated in the insurance, but resting the claim upon considerations which were honorary rather than legal. He seems to have supposed that he had no legal right, but a strong moral claim on their liberality. They repeated, and never in anywise qualified, their original declaration that the insurance was forfeited. The correspondence was closed in December, 1867.

The bill was filed on 2d July, 1874. Its purposes were that the policy, &c., still in the possession of the defendants, should

be exhibited by them, that the complainant should be permitted to pay all the accrued premiums which are unpaid, that the policy be declared valid and to have remained in force, and that the defendants should account for all the dividends which had been, or ought to have been declared upon it, deducting the $591.20 received as above in 1866.

The defendants, by their answer, and in argument, insisted that the insurance had been forfeited in 1861, that the accounts of all dependencies then outstanding were adjusted and finally closed by the settlement of 1866, that the complainant had never made any tender of the premiums in question, and that his delay to institute the present proceedings ought to preclude him from relief if he were otherwise equitably entitled to it, and that the civil war annulled and absolutely dissolved the contract of insurance.

E. F. Pugh, for the complainant, relied on:—

Insurance Co. *v.* Cloptin, 7 Bush. (Ky.) 179.
Insurance Co. *v.* Warwick, 20 Grattan, (Va.) 621.
Cohen *v.* Insurance Co., 50 N. Y. 610.
Sands *v.* Same, 50 N. Y. 626.
Hillyard, *v.* Insurance Co., 6 Vroom, (N. J.) 415, affirmed Ins. L. J. 1875, p. 127.
Hancock *v.* Insurance Co., 4 Bigelow's Col. 488.
Insurance Co. *v.* White, 4 Bigelow's Col. 476.
Hamilton *v.* Insurance Co., 9 Blatchford, 234, affirmed.
The company by their acts excused a tender by plaintiff.
Hamilton *v.* New York Life Ins. Co., 9 Blatchford, C. C. 234.
Conwell *v.* Haight, 21 N. Y. Rep. 462.
Corry *v.* Smith, 2 Comst. 65.
Blight v. Ashley, Peters, C. C. 16.
Rudolph *v.* Wagner, 36 Alabama, 698.

And even if this were otherwise, the possession by the company of the complainant's scrip and dividends, which he requested should be applied in payment of an equivalent amount of premiums, was sufficient tender.

The contract remained suspended, not determined, during the war; the complainant was not in default.

Brown *v.* Hiatts, 15 Wall. 184.

The Julia, 8 Crauch, 193.

Philips on Insurance, Vol. 1, Sec. 147.

3 Kent's Com. 255 and cases cited.

Lecker *v.* Montgomery, 18 Howard, 110.

The late rebellion was a war. The point thoroughly reviewed in

Wolfe *v.* Hawes, 20 N. Y. 201.

People *v.* Bartlett, 3 Hill, 570.

Hubbard *v.* Hernden Express Co., 10 Rhode Island Rep. 244.

Samuel B. Huey, contra.

Payment of the premiums, when due, being of the essence of the contract, was a condition precedent, the non-performance of which worked a forfeiture.

Howell *v.* Knickerbocker Co., 44 N. Y. 276.

Worthington *v.* Charter Oak Co. Supreme Court of Errors, Conn. M. S. S. 1875.

Angell on Insurance, Sec. 399.

Want *v.* Blunt, 12 East, 183.

Reese *v.* Insurance Co., 23 N. Y. 516.

Robert *v.* New England Co., 1 Disney, 355.

Pitt *v.* Berkshire Co., 100 Mass. 500.

Beadle *v.* Ins. Co., 3 Hill, 161.

Dillard *v.* Insurance Co., 44 Geo. 119.

As to laches preventing a recovery:—

Dermott *v.* Jones, 2 Wall, 7.

Perkins *v.* Rogers, 35 Indiana, 124.

Semmes *v.* Ins. Co., 36 Conn. 543.

As to civil war dissolving contract:—

Griswold *v.* Waddington, 16 Johns, 438.

Bunyan on Life Ins., 19 Law Library, 308.

The Rapid, 8 Cranch. 155.

Scholefield *v.* Eichelberger, 7 Peters, 586.

Leathers *v.* Ins. Co., 2 Bush. 298.

Sands *v.* N. Y. Life Co., 50 N. Y. 626.

Mitchell *v.* Ins. Co., Bliss on Life Ins., 644, and others, especially Tait *v.* Ins. Co., 2 Ins. L. J. 1872, 802, 861, 4 Bigelow's Col. 498 (affirmed in S. C. of U. S., the judges being equally divided).

He argued that, if a contract is entered into between parties who afterwards become alien enemies by the breaking out of war, and the contract is such that its continued existence does not require any intercourse between or any act of the parties during the war, it is an *executed* contract, and although its obligation is suspended during the existence of the war, on the return of peace it may be enforced; but if the contract be of such a character that its continued existence and obligation require and depend upon acts to be done by or between the parties during the war, then it is an executory contract, and it is annulled by the war, because there can be no intercourse between the parties, no payment or transfer of property, and no transmission of money.

A premium due must not be confounded with a debt which is suspended merely and not discharged.

Denniston *v.* Imbrie, 3 Wash. 396.

Ward *v.* Smith, 7 Wall. 447.

The distinction is obvious. Where the consideration has been received, and the obligation to pay is complete, no new act or volition, and no continuing business activity is necessary. By suspending these the debt without national injury remains. Under a policy of insurance, however, the most continuous and intimate business relations are indispensable.

A tender of the premium at close of war, if made, could not revive the policy.

Prichard *v.* Ins. Co., 3 Common Bench N. S. 622.

CADWALADER, J.

If the complainant were otherwise entitled to be reinstated in the insurance, he ought not to lose his right merely because, at a former time, under a mistake, he supposed the contrary.

Nor should he suffer because he at one time, erroneously supposed that the defendants ought to have applied the dividends in payment of accruing premiums. This was a mistake on his part, even upon the supposition that the dividends were of sufficient amount, and that he would, in ordinary times, have had an option to continue the insurance annually by such an application of dividends. The position would, even in that view of the case, have been erroneous, not only by reason of the effect of the hostilities, but also because a declared exercise by him of the option would have been indispensable. The defendants were certainly right in treating the dividends as a matter wholly distinct from the question of termination of the insurance.

The defendants are, however, for this very reason, in the wrong, if they insist that the settlement with them, by the complainant of the account as to the dividends ought to be deemed a waiver of his demand to be reinstated in the insurance. The two subjects are, I repeat, wholly distinct.

This being so, it was, according to his own theory of the case, necessary that, on the termination of the hostilities, he should tender the accrued premiums to the defendants, unless they dispensed with such a tender. There was no actual tender of the premiums with or without interest. But an actual tender was, in effect, dispensed with by the defendants' answer to one of his inquiries in the letter of the 31st of May, 1865. This inquiry was, *what steps he must take to continue the insurance?* The answer was, that the insurance *had been forfeited* for non-payment of the premium in 1861, and *would not be revived* by them. This meant that no tender to renew or continue it would be accepted. Such a tender would afterwards have been a purely idle formality. The case, therefore, is to be decided as it ought to have been if he had made an actual tender of the proper amount, whatever it may have been. The question is, whether such a tender, not made until the return of peace, would have been too late to avail him.

Did an insured inhabitant of one of the revolted States, who was prevented by the civil war from paying the annual pre-

miums in a Northern State, lose at once and irrevocably his option to continue the insurance?

The rules which determine whether impossibility to perform a contract will excuse its non-performance are not always applicable to questions of relief against forfeitures incurred through non-performance of conditions. There was no contract of the complainant that he would continue the insurance by payment of the annual premium before the end of the first, or before the end of any subsequent year. Any such payment on his part was optional. Until his election to make such payment within such limited time or times, there could not, on the other side, according to the form of the contract, be any ascertained conventional obligation of the defendants to continue the insurance beyond the end of a current year. The conventional continuance of the insurance depending upon this optional payment by the complainant within the year, such payment, within this limited time, was a *condition precedent* to such continuance, (Law Rep. 9 Ch. 502, and see Law Rep. 9 Eq. 705; Law Rep. 17 Eq. 316-320).

The decision of the case depends, therefore, upon the rules of legal and equitable jurisprudence on the subject of *conditions precedent.*

Impossibility to perform a condition precedent does not, *at law,* prevent the loss of that which depends upon performance. It is, therefore, necessary to consider whether, if the present suit had been upon the law side of this Court, compensation for the non-performance could be estimated by a standard of sufficient legal certainty, or to consider whether a court of law would be able to regulate properly the application of such a standard. Independently of any such question as to compensation, there was an absolute forfeiture at law from non-payment within the time limited. If this had even been otherwise it would have been impossible, on the law side of the Court to disregard the express provision of the policy upon the subject.

But the question here to be decided arises on the equity side of the Court.

A Court of Equity, in certain cases, disregards express provisions imposing forfeitures for breaches of conditions precedent or subsequent. Such a Court considers not the form of words used, but the differences in the nature of the conditions. But the Court will not relieve against any breach of a condition of either kind unless the sufferer has lost something really valuable, and the party who would be substantially benefited by the forfeiture can be adequately compensated, so that both parties may be put in the same situation as if the condition had been performed: (1 Salk. 231, 232; 2 Vernon, 338, 339, 344; 1 Vernon, 223; 1 Bro. Ch. 168.)

We may therefore inquire, first, whether such loss has been incurred, and secondly, whether such compensation can be made?

Under the first of these inquiries, there is, in principle, no resemblance to a question upon the renewal of an insurance against fire. Fire insurance and life insurance are so far alike that each is an aleatory contract. But in fire insurance there is uncertainty both as to time, and as to event. Fire is not inevitable. Moreover the inanimate subject of insurance against fire may, for the practical purpose of the contract, be considered normally unchangeable, both in value and as to hazard. Usually the party insured for a limited period against fire has no exclusive option to renew the insurance. When renewable it can be renewed only by mutual consent. Even if this were conventionally arranged otherwise, and the option were exclusively his own, it would be an option of no appreciable value. The risk and the market rate of premium being both, from year to year, normally the same, the expense of making an independent new fire insurance with other insurers does not normally exceed that of the renewal of a former insurance, except in the mere cost of a new policy, and of a stamp where the law requires one.

But in the case of a life insurance, the event is not *uncertain except only as to the time of its occurrence.* Death at some time is inevitable. The consequences of this difference are, in many respects, very material. (See 15 C. B. 374, 389, 391,

392.) When there is an option to *renew,* or, in more proper language, to *continue* the insurance from year to year, this option belongs exclusively to the party insured. It is a *valuable* right or privilege; and is of *constantly increasing* value for two reasons. The first is that the health of the insured may fail during the first or any other year, so that his life would not, at the end of such year, be insurable at the same rate, or even perhaps, at any rate of premium. Nevertheless he has a right to the benefit of continuing the insurance at the conventional rate. (See Law Rep., 9 Eq. 719; Law Rep., 19 Eq. 79, 83, also Law Rep., Ch. 386-7.) The second reason is, that although he may continue in sound health, he is, at every succeeding instant of time, nearer to death. The market rate of premium for an independent new insurance meanwhile is, for this reason, constantly increasing; but under his policy the conventional rate of annual premium continues to be the same. For this two-fold benefit he pays a full, and sometimes more than adequate, consideration. In the present case, the insurance had, before the civil war, been continued more than fourteen years; and the amount of premiums paid, with interest, was, at the commencement of the war, not less than three-fifths of the sum insured. This, if the defence prevails, the complainant loses irrevocably. Moreover, under the most favorable condition of his health, he could not, at the commencement of the war, have effected an independent new insurance at an annual premium of less than almost double the conventional rate of the annual premium fixed in the defendants' policy. These proportions may be, in part, varied in the present case of a mutual insurance company, by dividends of accrued profits. But the difference cannot affect the principle in question.

His option to continue the insurance on fulfilling the condition precedent was thus a right of real value. It resembles, in this respect, and in some other respects, a tenant's right of renewal of a lease of land for lives. We may, from judicial precedents on the other side of the Atlantic, take as a pertinent example, a tenancy at a certain rent, for three lives, renewable

perpetually at the same rent, on the payment of a *fine* within a certain limit of time from the falling in of any life. The so-called fine is not of the nature of a penalty; but it is merely a certain sum which, in addition to the rent, is payable on a death, for the renewal of the lease. In some such leases, there is, and in others there is not, a covenant of the tenant that the fines shall be paid. In the latter cases the payment is optional with him and his representatives. In these cases the value of the tenancy, in proportion to the annual rent, may be considered as constantly increasing. It is the ordinary purpose of such leases to encourage the erection of buildings, or to promote the improvement of agriculture; and the right of perpetual renewal induces expenditures for such permanent objects. But the value of the unimproved land may continue the same, or it may deteriorate; and therefore, perhaps, in the absence of an express covenant to build or otherwise improve, the increase in value from such causes may be considered merely contingent. However this may be, the amount of the tenant's investment is absolutely and permanently increased by his first and every subsequent payment of a fine upon the falling in of a life. This appreciable increase of his investment attendant upon the exercise of his option to renew, directly resembles the effect of the payment of annual premiums for the continuance of a life insurance. The option is, in each case, a valuable right.

The second inquiry is, whether compensation can be made. This inquiry may always be understood as impliedly including the first, because where compensation is required, the subject must be of some value. In many cases where the subject is of real value, there is no practicable standard for equitable compensation, even though the ordinary condition may be a subsequent one. (See these cases reviewed in 2 Price, 200; and see Law Rep., 10 Ch. 626.) But there can be no such difficulty where performance would have consisted in the payment of a certain amount of money, and the only subject of ultimate forfeiture would also be money. In the present case, the complainant, if otherwise relievable, can make adequate

equitable compensation by paying the annual premiums with interest upon each of them.

In the cases already mentioned of leases for years renewable forever, there was a difficulty in making compensation to the landlord, where, after the falling in of a life, a lapse of the right of the renewal at law had occurred from non-payment of the fine within the time limited. The difficulty arose upon considering that, on the falling in of a life, such a postponement by the tenant of the nomination of a new life, postponed, in effect, the chance of another death, and thus diminished the probable frequency of the payment of the fines attendant upon deaths. The difficulty was overcome by estimating seven years to be, according to known analogies, the reasonable average duration of every such life as the tenant might have named in due season. The compensation, where relief could otherwise be given, was, therefore, computed as including the first fine, and an estimated additional fine of equal amount at the end of every seven years of the whole interval elapsed; and interest was charged as on the first fine, and every additional septennial amount (Sweet *v.* Anderson, A. D. 1722, 2 Bro. P. C. 257, (430) cited with approval by Lord Mansfield, in Ridgw. P. C. 135, and by Lord Redesdale in 2 Sch. & Lef. 686).

In the present case there cannot be any such difficulty. The premiums are of invariable amount, and of stated annual recurrence. In language of Lord Wensleydale, "the liability of the insurer" is "constant and uniform to pay an unvarying sum on the death of the *cestui que vie,* in consideration of an unvarying and uniform premium paid by the insured. The bargain is fixed as to the amount on both sides." (15 C. B. 389.)

If it be objected that the defendants were entitled to use the premiums in their current business of insurance, and that they might, through such use, have made profits exceeding the interest—the answer to the objection is that interest is estimated an equivalent for speculative compensation where a cognizable equity would otherwise be defeated. (See Story's Equity,

section 1316 in the note.) If this were at all doubtful, it might be added that against the greater chance of greater profit was the hazard of more than proportionate losses, and that, in this particular case, the complainant would be entitled on the principles of mutual insurance, to his own due proportion of accrued profits.

Under contracts to pay money, interest does not accrue while war suspends payment of the principal debt. The rule ought to be different in defining the measure of compensation to relieve against a forfeiture occurring, as this did, through postponement of the right of election. Unless interest, or a sum equal to it, were allowable, full compensation would not be made.

Whether, if the complainant is relievable in the present case, he should be required to pay such interest for the period since the defendants' letter of June, 1865, will depend upon the effect of this letter; and may perhaps be a question of some difficulty hereafter. But independently of this question, a sum equal to full interest on each premium ought certainly to be added.

The case, therefore, is one in which, if relief would otherwise be proper, adequate compensation can be made.

In 1 Vernon, 223, Lord Keeper Guilford said that "in all cases where the matter lies in compensation, be the condition precedent or subsequent, he thought there ought to be relief." There is, however, the following important difference, in this respect, between the breach of a precedent, and that of a subsequent condition. In the latter case, relief may be given where compensation can be made, although the non-performance of the condition has occurred through mere negligence of the sufferer, unless it has been wilful or perverse neglect. But a Court of Equity does not, in any case, relieve against losses consequent at law upon the non-performance of a *condition precedent* where such non-performance occurs through neglect alone, or other fault of the sufferer.

A reference to authorities on this point may elucidate the general subject. They are found in decisions upon cases already more than once mentioned, of the forfeiture of rights

of renewal of leases for lives through non-payment of a fine by the tenant within the appointed period after the occurrence of a death. We have seen that if a lapse occurs through such omission, there is, on the one hand, a forfeiture of a valuable right, and there can, on the other hand, be adequate compensation. An existing tenancy under a lease renewable forever is very like a present fee, and the loss which the tenant would incur at law, through such a lapse, has no small resemblance to some other forfeitures which may occur through non-performance of conditions subsequent. The resemblance does not suffice to make the condition a subsequent one. Payment of the fine is clearly a condition precedent to the legal right of renewal. But there can be no supposable case of breach of a precedent condition which would be more entitled to favorable consideration. Thereupon arose the question whether equity would relieve where the lapse had occurred through the tenant's own mere neglect, or mere insolvency. The English Chancery and Exchequer as courts of original equitable jurisdiction, have uniformly refused to give relief in cases of this kind. (See the case A. D. 1738, Fonbl. Tr. Eq. 425 (*n*); also 3 Bro. Ch. 529; 3 Ves. 295, 690; 11 Price, 3 and 13 Price, 694; S. C. M'Clelland, 464.) Irish Courts of Equity have, on the contrary, relieved against the legal consequence of such lapse, where the default has occurred through mere neglect, without any fraud. But these Irish decisions were overruled, and two of them reversed by the House of Lords in England in 1776 and 1779. (Kane *v.* Hamilton, Ridgw. P. C. 180; Bateman *v.* Murray, 5 Bro. P. C. 20, S. C. Ridgw. P. C. 187.) The latter of these judgments of reversal was followed in 1780 by the enactment of an Irish statute known as the Tenantry Act. (19 and 20 G. 3, c 30.) This act was partly declaratory and partly remedial. (See the statute itself and 2 Sch. & Lef. 681.) It restored for Ireland what has been there called the local equity, or the old equity of the tenants in cases of neglect without fraud, unless it should appear that the landlord had demanded the fine or fines, and that the same had not been paid within a reasonable time after such demand.

Some subsequent decisions in Ireland, if not revised on appeal, might have induced an erroneous belief that under the so called "old equity" as revived by the act, the tenants had "a right to delay the renewal of their leases as long as they pleased." But these decisions have been reversed in England by the House of Lords. (See the review of these cases in Sugden on the Law of Property, as administered by the H. of L., 569, 556-570.) Out of Ireland it is not a cognizable equity; and neither these Irish decisions since the Tenantry Act, nor the judgments on appeal from them, are of any importance out of that country.

In the present case, the complainant, therefore, by non-payment of the premium within the year ending in September, 1861, would have lost irrevocably the option to continue his insurance if the payment had not been unavoidably prevented. (See Edwards *v.* Warden, Law Rep., 9 Ch. 502, and the case in the House of Lords, mentioned in Law Rep., 19 Eq. 608-610, 612.)

But the payment of this, and of the subsequent premiums, within the times limited, was unavoidably prevented; and there was, in fact, no negligence whatever on his part.

Where the breach of a condition precedent is excusable, and compensation can be made, the general rule of equity is to relieve against a forfeiture.

But what will make the breach excusable? If the condition is annexed to land, or some other specific subject, a very indulgent latitude of excuses appears to have been allowed. Recurring once more to leases for lives renewable forever, we find opinions of Lord Thurlow in the House of Lords, (Ridgw. P. C. 202,) and of Lord Alvanley at the Rolls, (3 Ves. 693), that any disabling accident, misfortune or surprise, or ignorance not wilful, which prevents the tenant from applying at the stated times for renewal according to the terms of his lease, will afford sufficient reason for giving relief to him in equity against the lapse at law. Relief has even been given where performance had been prevented by so called impossibilities which were not absolute, but only relative. Lord Mansfield said in the

House of Lords in 1776, that the decisions of such cases depended upon their peculiar circumstances: (Ridgw. P. C. 185.) He said this with reference to previous cases in the House of Lords in which relief had been given. In one of those cases payment had been delayed by an unavoidable uncertainty whether a life had in fact fallen in or not. The decision was that, assuming the death in question to have happened in this interval of uncertainty, and the lapse to have occurred, the tenant was nevertheless relievable (Sweet *v.* Anderson, A. D. 1722, cited above.)

Where nothing specific has been forfeited at law, but the ultimate forfeiture would be only that of a right to a certain sum of money, there is not sufficient reason for such indulgent relief, though, as we have seen, compensation can more readily be made. The abstract principle of equity is, indeed, the same; but its application is restrained and qualified by practical considerations. In cases of life insurance, under this and other heads, we find the law of conditions modified by such considerations. (See 12 East, 183, 186, 187.) In the absence of a strong equitable necessity, there should be nothing precarious in this part of the business of insurers. They have a right to insist upon the utmost practicable punctuality in the fulfilment of every condition upon which a risk is to be incurred or continued. Contingent relative impossibilities, if always recognizable as excuses, would render the option to renew or continue the risk from year to year too uncertain a part of the contract of life insurance. We may, therefore, discriminate between relative and absolute impossibilities. But in doing so, it is not, for any present purposes, necessary to define precisely the equitable standard of sufficiency of an excuse for lapse from delay in the payment of the annual premium. Assuming that nothing short of absolute impossibility should be admitted as an excuse, the temporary impossibility was, in the present case, absolute.

A Court of Equity ought certainly to recognize the sufficiency of such an excuse. Let us, for example, suppose that, through a judgment under a quo warranto, the charter of the defend-

ants had been forfeited in 1861, that the judgment of forfeiture had been reversed in 1865, and that consequently, during this interval, their corporate faculties had been suspended, so that there was no person capable of receiving the premiums. In such a case, the disability would, in itself, create an equitable excuse.

In the present case we may further consider the peculiarity of the cause of the impossibility. Its cause was the suspension of conventional relations, and the unlawfulness of intercourse between enemies. In addition to the disability of the insured, as an enemy, to make payment, it was, during the war, unlawful for the insurers to receive any payment from an enemy. Their corporate faculties were, in this respect, suspended, as it were, so that if he had been able to offer payment, it could not have been accepted by them.

But it has been suggested that the cause of this temporary disability was the civil war, which, in its penal effects, made the excuse of impossibility inadmissible here, though it would otherwise have been a sufficient excuse. If we were to trace a succession of causes immediate and remoter, it might, perhaps, be said that the cause of the forfeiture was the absolute impossibility of payment of the premium within the limit of time; that the cause of this impossibility was the suspension of intercourse and of conventional relations between enemies; and that the war was the cause of the non-intercourse, and of the suspension of conventional relations. But this would be over-nice reasoning. The suggestion is that the subject is not thus divisible, and that the war, in itself, was the proximate cause, or, practically speaking, the only cause.

If so, what was its effect? Did it produce or occasion any forfeiture whatever?

In time of war, between enemies, new conventionable rights are not acquirable, and new obligations are not incurrable. Moreover, any rights or obligations which existed at the commencement of the war, may, by confiscation, be extinguished. But in the late civil war there was neither legislative nor judicial confiscation of the present subject of controversy; and

where confiscation is not actually enforced, pre-existing rights and obligations are not extinguished by war. They are only suspended until peace. The rules of law are the same as to a rebellion so organized as to create a temporary state of war.

Therefore, the war was not a cause of any forfeiture. None was incurred in addition to that incurred at law through the mere non-payment of the premium.

The impossibility of payment of it was thus in equity a sufficient cause for non-performance of the condition in question.

The complainant thus appears to be entitled to an interlocutory decree for an account of his share in the profits of the defendants' business since those credited in their settlement with him, which resulted in the payment of $591.20. Whatever he may be entitled under this head should be deducted from the amounts of the premiums of 1861, and the subsequent years, with interest. When the interest should cease may be a deferred question. Upon his payment of the balance, when ascertained, to the defendants, or if they will not receive it, into the Registry of the Court, the final decree should reinstate him in the insurance, and direct the policy now in their possession to be returned to him, with as beneficial effect as if it had not been cancelled or defaced; and they should be prohibited from pleading, in any future action upon it, either that it is not their deed, or that any premium or premiums thus paid under the decree were not paid within the times respectively limited.

The subject has been considered almost wholly on original grounds, because in cases more or less like the present, the conflict of opinion, since the war, has been apparently quite irreconcilable. It will not be necessary to mention any of the opposing decisions of State courts. On 6th of April, 1874, the Judges of the Supreme Court of the United States, being equally divided in an opinion upon two cases, which had been very fully argued, affirmed in each case the judgment of a Circuit Court of the United States, without giving any reason except the division of opinion. In each case a policy of life in-

surance had contained a provision like that of which the effect is here in question.

The decision below in one of these two cases (Hamilton *v.* The Mutual Life Insurance Company) is reported in 9 Blatchford, 234. The insured had survived the war. So soon as the insurers, on the return of peace, could lawfully receive any payment from him, he had tendered to them the amount of all the annual premiums for the period of the war. The tender was not accepted. He afterwards died; and, under proceedings in equity, at the suit of his executor in the Circuit Court for the Southern District of New York, the complainant was reinstated in the insurance. According to this decision of the Circuit Court, the present complainant should have relief.

In the other case (Tate *v.* The New York Life Insurance Company) the party insured had not survived the civil war, but had died in the early part of it, after non-payment of a single annual premium. On the termination of the hostilities, his representatives tendered to the insurers the unpaid premium and afterwards brought a suit in equity against them in a Court of the State of Tennessee. The suit was removed into the Circuit Court of the United States for the Western District of Tennessee. On examination of the printed record in the Supreme Court, it appears that the proceedings in the Circuit Court were such, that the counsel, on each side, doubted whether the hearing or trial was to be on the law side or on the equity side of the Court. But all difficulty under this head was removed by an agreement which became part of the record. The decision of the Circuit Court was that the complainants had no right of action at law or in equity. The opinion of that Court is in 2 Ins. L. J. 861, and 4 Bigelow's Collection, 479 (n), without a sufficiently full prefatory statement of the case.

As between the parties litigant, and as to all persons privy in interest, the affirmance of these two judgments by an equally divided Appellate Court, was not less conclusive than if a majority of the Court of Appeal had concurred in the judgment of affirmance. But the Supreme Court of the United States have more than once intimated that such a decision is not.

in that Court, considered as a judicial precedent, establishing authoritatively any principle as applicable to subsequent cases of a like character between other parties: (11 Wheaton, 59, 78, 7 Wallace, 107, 113). A dictum of Judge Grier (7 Wallace, 109), attributing greater force to it, as an authoritative judicial precedent, must therefore be disregarded. But the authority of a decision of a Circuit Court cannot, after such an affirmance, be disregarded in the same or in other Circuit Courts until a subsequent decision of the Supreme Court to the contrary. This remark might apply to either of the two decisions now in question if the other one had not also occurred.

This introduces an inquiry, whether the two decisions of the Circuit Court are irreconcilable and conflicting. The judicial reasoning, which appears by the reports to have induced the respective decisions cannot be reconciled. But the points which were actually decided may reasonably consist with each other. The difference between the cases has already been stated. It is that in the Tennessee case, the person insured had not, as in the New York case (and in the present case), survived the war, and elected to make compensation. In the Tennessee case, therefore, compensation, if made, could not *continue* an insurance. The insurance had been upon a life which was ended. There was not, as in the other cases, a continuing risk; nor was there an option to be prolonged. The option was already gone. The offer of compensation could only in substance and effect be a proposed credit in reduction of the amount of money insured. There could be no absolute certainty that, if there had been no war, the person insured would have elected to pay the premium in 1861. His former motives for insuring might have ceased to exist; but, on his death, his representatives could not, if they had a continuing right of election, have any possible motive to forbear the exercise of it. Such cases have been compared to an option to buy a lottery ticket, where the election to buy is not made until after the ticket has drawn a prize, (Law Rep., 9 Ch. 503), or to buy the haul of a seine, where the election is deferred until after the net has been drawn in.

The distinction is neither strengthened nor weakened by the decisions which have arisen in the course of the proceedings to wind up insolvent insurance companies under the English Statute of 1862, called the Companies Act. Under such proceedings all the business of an insolvent English company terminates, and all the funds and assets pass into the hands of an official liquidator. The effect of the statute is to determine for certain purposes, the rights of all parties with reference to the time of the commencement of the proceedings to wind up the business. The interest of every party insured on which he may claim a dividend is the estimated value of his insurance, when he makes his proof. The continuance of such a transmuted interest cannot depend upon payment by him of premiums which it would have been necessary for him to pay in order to continue the insurance if the proceedings to wind up had not been instituted. Therefore, no such payment is required. (Law Rep., 9 Eq. 705-6.) If he is alive, the valuation of his interest is the amount of money which, at his increased age, and in his actual state of health, good or bad, he would be obliged to pay, at this time, in order to effect an equally beneficial insurance on his life with a solvent insurance company: (Law Rep., 9 Eq. 716-719, 14 Eq. 79, 83, Law Rep., 6 Ch. 386-7). If he dies before making proof, his representatives may claim; and the value may then be estimated as equal, or approximately equal, to the sum insured, less the amount of any premium or premiums which would have been payable for continuing the insurance if the company had not been wound up. But in the latter case, the death does not create a claim to this difference, otherwise than as it happens to be a proper method of approximately adjusting the valuation: (Law Rep., 9 Eq. 711, 719, 721). It includes no claim to the sum insured *as such*. There is thus no proper analogy, in principle, to the distinction in question.

This distinction has, however, to some extent, a support from English opinions upon policies which allow *days of grace* for the renewal or continuance of insurances in cases of lapse through default in payment of premiums within the stated

periods. During the days of grace, after the expiration of the time otherwise limited, the insurer, *if living,* may, on payment of the premium, under certain conditions, purge his default so as to be reinstated in the insurance. But what if he dies *during the same interval,* without having been reinstated? After his death, can his representatives, *within the days of grace,* purge the default with like effect, by payment of the premium and fulfilling the other conditions? On this point there have been English opinions of a strongly negative tendency. It is true that these opinions were founded, in great part, upon the language of the clause in each policy which gave the time of grace. But they were also founded, in part, upon reasons derived from considerations of the nature of contracts of life insurance. (See 12 East, 183, 187; 3 C. B. N. S. 633, 637, 638, 640, 643, 644; also 2 C. B. N. S. 257, 295-6, which last case, however, arose upon an insurance against accidents.) To avoid the effect of these opinions, an express provision has been inserted in recent English policies, that "In the event of the assured dying within the days of grace, and before payment of the premium, the policy will be held valid and effectual, and the premium will be deducted from the sum insured." (See Law Rep. 9 Eq. 704.) This may seem to imply that without such an express provision the law would be otherwise.

It is not necessary to intimate an opinion as to the soundness of the distinction. We have seen that if it were necessary to reconcile the two adjudications of the Supreme Court as authoritative precedents, this could be done so far at least as to enable this Court to follow the decision of the New York Circuit Court in a case precisely like it until the subject shall have been considered anew by the Supreme Court.

It has been suggested for the defence, but not much pressed, that there has been culpable delay on the part of the complainant, in bringing the present suit. Until his death, no definitive right of action will have accrued; but in the meantime, his invocation of the exercise of equitable jurisdiction has become proper by reason of the forfeiture at law, and

of the cancellation of the policy by the defendants, and their accountability for dividends of profits, which accountability complicates the question of equitable compensation. Therefore even if the policy had not been, as it is, a sealed one, the suit would not have been too late.

But it is not improbable that, at the present session of the Supreme Court, the question or questions upon which the judges were equally divided in opinion in 1874, may be authoritatively decided. This cause, if neither party shall show reason to speed it, may therefore stand over for the present, without any formal entry of a decree.

EDITOR'S NOTE.—The cases then under consideration in the Supreme Court, alluded to in the closing paragraph of the above opinion, were the New York Life Insurance Company *v.* Statham, Same *v.* Seyms, and the Manhattan Life Insurance Company *v.* Buck, Executor, 3 Otto, 24. The opinion of the majority of the Court in these cases, although adverse to that of Judge Cadwalader, on the question of forfeiture, was in favor of the right of the complainants to recover what their policies were equitably worth at the time of their default to pay annual premiums. Accordingly a modified decree was entered on this principle in this case for complainant, after ascertainment of the sum by agreement of parties, for $550, with costs.

DISTRICT COURT. FEBRUARY 29, 1876.

CRIMINAL LAW.

THE UNITED STATES *v.* NEWCOMER

The Act of Congress of March 1st, 1875, is authorized by the 14th Amendment of the Constitution of the United States, and a clerk in charge of the reception of travellers at a hotel may be liable to conviction for a violation of the provisions of the Act.

INDICTMENT under the Act of Congress of 21st March, 1875, known as the Civil Rights Bill, for refusing hotel accommodations to a person of color.

STATEMENT.

The evidence for the prosecution showed that the defendant was in charge of the office at a hotel called the Bingham House; that Fields Cook, a Baptist minister, from Alexandria, Va., a man of color, applied for accommodation, and was refused a room by defendant; that Cook left and returned and was allowed to sit in a side room all night; that some eighteen other persons were admitted to rooms during the night. It also appeared that another guest of the house, a witness, applied to the defendant, stating his willingness to receive Fields Cook in a room occupied by the witness and two others, in which there was a spare bed, but defendant said he did not desire to have anything to do with Cook. The defendant told him that he had refused him the room because of his color.

District Attorney Valentine and *Assistant Hazlehurst,* for United States.

Hon. B. H. Brewster, for defendant.

CADWALADER, J., charged the jury as follows:

The Fourteenth Amendment of the Constitution of the United States makes all persons born or naturalized in the United States, and subject to the jurisdiction thereof, citizens of the United States, and provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws. This amendment expressly gives to Congress the power to enforce it by appropriate legislation. An Act of Congress of March 1st, 1875, enacts that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land and water, theatres and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, and makes it a criminal offence to vio-

late these enactments by denying to any citizen, except for reasons by law applicable to citizens of every race and color * * * * the full enjoyment of any of the accommodations, advantages, facilities or privileges enumerated.

As the law of Pennsylvania had stood until the 22d of March, 1867, it was not wrongful for innkeepers or carriers by land or water to discriminate against travellers of the colored race to such an extent as to exclude them from any part of the inns or public conveyances which were set apart for the exclusive accommodation of white travellers. The Legislature of Pennsylvania, by an Act of March 22d, 1867, altered the law in this respect as to passengers on railroads. But the law of the State was not changed as to inns by any act of the State Legislature. Therefore, independently of the amendment of the Constitution of the United States and of the Act of Congress now in question, the conduct of the defendant on the occasion in question, might, perhaps, have been lawful. It is not necessary to express an opinion upon this point, because the decision of the case depends upon the effect of this Act of Congress.

I am of opinion that under the Fourteenth Amendment of the Constitution, the enactment of this law was within the legislative power of Congress, and that we are bound to give effect to the Act of Congress according to its fair meaning. According to this meaning of the act, I am of opinion, that if this defendant, being in charge of the business of receiving travellers in this inn, and of providing necessary and proper accommodations for them in it, refused such accommodations to the witness Cook, then a traveller, by reason of his color, the defendant is guilty in manner and form, as he stands indicted.

If the case depended upon the unsupported testimony of this witness alone, there might be some reason to doubt whether this defendant was the person in charge of this part of the business. But under this head the additional testimony of Mr. Annan seems to be sufficient to remove all reasonable doubt. If the jury are convinced of the defendant's identity, they will

consider whether any reasonable doubt of his conduct or motives in refusing the accommodations to Fields Cook can exist. The case appears to the Court to be proved; but this question is for the jury, not for the Court. If the jury have any reasonable doubt, they should find the defendant not guilty; otherwise they will find him guilty.

The jury found defendant guilty.

EDITOR'S NOTE.—See United States *v.* Stanley and four other cases, 109 U. S. 3, in which the Supreme Court decide that the act, so far as it relates to this subject, is unconstitutional.

CIRCUIT COURT. APRIL 6, 1876.

FOREIGN ATTACHMENT.

DUNN BROTHERS *v.* DUNCAN, SHERMAN & COMPANY, DEFENDANTS, AND BANK, GARNISHEE.

Foreign attachment. Judgment by default for want of an appearance. Practice.

MOTION for judgment in foreign attachment.

This action had been begun in the Court of Common Pleas of Philadelphia County, No. 3. The writ of foreign attachment was issued against W. B. Duncan and W. Watts Sherman, trading as Duncan, Sherman & Co. It having been afterwards ascertained that one Francis H. Grain was at the time that the attachment issued, a partner of the defendant firm, the said court, on the 11th of October, permitted an amendment, adding his name to the writ of attachment, as of that date, October 11th, without prejudice to the rights of the garnishee and all other intervening rights. The case was subsequently removed to the Circuit Court for the Eastern District of Pennsylvania, under the Act of Congress of the 3d March, 1875.

A declaration having been filed by the plaintiffs, the defendants, Duncan & Sherman, appeared and pleaded.

A. Sydney Biddle, for the plaintiffs, now moved for an interlocutory judgment against the defendant, Grain, for default

of an appearance in accordance with the Act of Pennsylvania of 13th June, 1836, section 53 P. L. 584, Purd. Dig. 719 pl. 13, and the rule of practice as laid down in Millard *v.* Graham, 1 Weekly Notes, 241.

J. E. Gowen, amicus curiæ opposed the motion.

Though this is the third term both of the State and United States Court after the attachment issued, it is not the third term in the United States Court after the amendment was made.

[CADWALADER, J. The terms must be computed by the law of the State Court from which the action was brought hither, and this is the third term of that court after the amendment was made.]

Then no notice has been given to Grain, directly or constructively. His name was not included in the original writ, and the amendment, even if permissible, was made long after that writ was issued.

[MCKENNAN, J. The effect of an amendment is to include Grain in the writ of attachment from the time when the amendment was made, from which time it is as much notice to him as it would have been in the original service of the writ, if his name had then been upon it.]

THE COURT [MCKENNAN, and CADWALADER, JJ.] ordered judgment entered for the plaintiffs against the defendant, Grain.

DISTRICT COURT. APRIL 12, 1876.

NEGOTIABLE INSTRUMENTS.

THE MERCHANTS' NATIONAL BANK OF ST. LOUIS *v.* SHAW & ESREY.

1. A bill of lading is not made a negotiable instrument by the Bailee's Act of 24th September, 1866, in the same sense that a bill of exchange or promissory note is negotiable.

2. The negotiation in Pennsylvania of a bill of lading issued in Missouri for transportation to Pennsylvania, is governed by the law of Pennsylvania, and not by that of Missouri.

3. The purchaser of a stolen bill of lading, aware of facts from which he had reason to believe that the document was held to secure payment of an outstanding draft, takes no title as against the true owner, in the absence of negligence by the latter.

4. PER CURIAM. A *bona fide* purchaser of a stolen bill of lading, in the absence of negligence upon the part of the true owner, as against the latter takes no title to the property represented by the bill of lading.

STATEMENT OF THE CASE.

REPLEVIN by the Merchants' National Bank of St. Louis against Shaw & Esrey for 170 bales of cotton, of which 101 bales were found in their possession, for which number a claim property bond was entered by them. The narr. was in the usual form. Pleas *non cepit,* property in the defendant.

Upon the trial it appeared that, during the whole of 1874, Norvell & Co., of St. Louis, were engaged in shipping large quantities of cotton to Kuhn & Bro., of Philadelphia. In June, 1874, an agreement was made between Kuhn, Norvell and the plaintiffs, that the latter would make advances upon the bills of lading received by Norvell from the transportation company, and hold them as security until these advances were repaid. In pursuance of this arrangement, on November 11th, 1874, the plaintiffs discounted for Norvell & Co. a draft of Norvell & Co. on Kuhn & Bro. for $11,947, at 20 days after sight, and at the same time received an original bill of lading for 170 bales of cotton, deliverable to the order of Norvell & Co. with the bank endorsement of Norvell & Co. on the back. The cotton represented by this bill of lading was shipped the same day to Philadelphia. A duplicate bill of lading marked "not negotiable," was received by Norvell at the same time from the transportation company, and, in accordance with their course of dealing, mailed by him the same day to Kuhn, for the purpose of notifying him of the shipment of the cotton. The plaintiffs the same day mailed to their correspondents in Philadelphia, the Bank of North America, the original bill of lading with the draft pinned on, instructing them to have the draft accepted, and to hold the bill of lading until it was paid. This enclosure reached the Bank of North

America in the early mail of November 14th, and the same morning the runner took to the counting house of Kuhn & Bro. the original bill of lading and the draft, and handed them to Kuhn, folded, and pinned together for acceptance.

The runner testified that Kuhn took them in his hand as usual, unpinned them that he might write the acceptance, accepted them, pinned together again the draft, and (as he, the runner, supposed) the original bill of lading, and handed them back. The runner returned them to the cashier, and they were kept in the safe of the bank until the day of payment of the draft, when the draft was protested, and, upon examination, it was found that the duplicate and not the original bill of lading was attached to the draft. All the officers and employés of the bank, who had any knowledge of the draft, were called, and testified that they had not consented to, or had any knowledge of, this substitution.

On November 14th, a short time after the runner had presented the draft for acceptance, Kuhn obtained from Miller & Bro., general commission merchants, an advance of $8,500 on the original bill of lading for 170 bales, at the same time giving Miller instructions to sell the cotton as soon as possible; in accordance with which instructions Miller placed samples, which had been sent on in advance, in the hands of Brown, a cotton broker, who, on November 21st, sold it to the defendants for cash. This sale was made by sample, and without any exhibition to the defendants of the bill of lading or other muniment of title.

When the cotton arrived in due course, about the end of November, Miller ordered the transportation company to deliver it to the defendants' warehouse, where it was found and replevied on December 11th.

There was no evidence affecting the *bona fides* of the defendants' purchase. As to the *bona fides* of Miller & Bro. there was evidence that Miller had been in the habit of frequently advancing to Kuhn on bills of lading; that on October 28th, 1874, he advanced $6,000 on an original bill of lading for 143 bales of cotton deliverable to the order of Norvell & Co., and en-

dorsed by Norvell & Co., just as the bill of lading in this case was endorsed; that on the day following Kuhn came to him and got the bill of lading back, giving to him a cheque for $6,000, marked "good;" and that later on the same day Miller made a new advance of $7,000 on the same bill of lading. It also appeared, that Miller's attention on the morning of October 29th had been called to an advertisement in the papers, announcing that this bill of lading for 143 bales had been stolen, and warning the public against its circulation; and that before Miller made his new advance of $7,000 he called upon Lewis, president of the Farmers' and Mechanics' Bank, who, he had heard, had some interest in the matter, and was informed by Lewis that the bill of lading had been wrongfully abstracted from them, but that the matter had been settled, and that he could now advance in safety upon it. There was also some discussion between them as to the right of the bank to stop the cotton after Miller had advanced upon the bill of lading, in which Lewis said that if a man stole his horse he had a right to and would retake it wherever it was found.

It further appeared that on November 14th, after Miller had advanced $8,500 on the bill of lading for 170 bales, at the suggestion of his son, as a matter of extra precaution, as he said, he telegraphed to the agent of the transportation company at St. Louis, inquiring whether the bill of lading was correct, and received the reply that it was. It also appeared, that, with the exception of the bills of lading of October 28th and November 14th, he had, in nearly all his dealings with Kuhn, made his advances upon duplicate bills of lading.

R. N. Willson, and *Geo. Junkin,* for plaintiffs.
W. H. Lex and *J. E. Gowen,* contra.

THE COURT (CADWALADER, J., MCKENNAN, J., sitting with him and concurring in the charge), after reviewing the facts, charged as follows:—

The effect of these transactions and of the letters and other evidence was that the cotton was appropriated for the security of the bank, not merely until acceptance of the bill of exchange,

but until actual payment of it. Such a stipulation is proved, and not disputed. Upon the effect then of what has been stated, the plaintiffs had a special property in the cotton in question for the security not only of the acceptance, but the payment of the bill of exchange. Until, therefore, the plaintiffs voluntarily parted, if they ever did so, with the bill of lading, or bill of exchange, or otherwise lost their title to it, they had a special property in this cotton which authorized them to maintain the present action.

As this bill of lading was negotiable, it becomes very important to inquire whether the possession of it was wilfully or negligently parted with by the Bank of North America as agent of the plaintiffs, because if the true owner of property, through himself or his agent wilfully or negligently allows the muniments of title, especially such a muniment as a bill of lading to get out of his possession and into circulation, so as to enable a wrong-doer to impose himself upon others as the owner, the true owners of the property may be divested of their title, and the wrong-doer able to pass to innocent parties a better title than the rightful owner would then have. It, therefore, becomes very important to inquire whether the Bank of North America wilfully or negligently parted with the possession of the original bill of lading, and as that bank was the agent of the plaintiff, and as the means of knowledge were, we think, peculiarly within their reach, reason and common sense would induce us to expect that the proof of the truth as far as it could be ascertained would come from the party who thus had the means of knowledge. Accordingly, the plaintiffs have undertaken to prove how, as far as they were able to show, this bill of lading got out of their possession, and their proof is very simple, and may probably be very satisfactory to you. In the first place they produce the president and cashier, which is proper if it were a mere formality, and it is a proper formality, to say that there was nothing known to them to authorize any departure from the regular rules of business. They had no right to part with it as between them and the plaintiffs, but, lest innocent persons should suffer, the proof is made that they never

authorized nor knew anything about it. Then the subordinates who would have knowledge on the subject are produced, and their testimony is to the same effect.

[His Honor then discussed the evidence, and left it to the jury to say whether or not the Bank of North America or its servants had been guilty of negligence.]

If the plaintiffs or their agents, neither wilfully nor negligently parted with this bill of lading, but it was surreptitiously abstracted, the Court is of opinion that Kuhn could not transfer to Miller a better title than they themselves had. The facts of the particular case are with the jury; the law, as the Court is at present advised, I have stated. A bill of lading is in certain forms of it negotiable at common law, and in other forms of it is negotiable by a law of Pennsylvania passed in 1866. Other States have passed laws which are somewhat different. Louisiana and Missouri have passed laws which used words making a bill of lading negotiable in the same way that a bank note or bill of exchange is negotiable. The Pennsylvania law omits those words, and the Court is of opinion that their omission is to be considered in the interpretation of the act, and that while a bill of lading is to certain intents negotiable so as to pass the legal title among parties rightfully concerned in it, and so as to enable a wrong-doer, under circumstances such as I have explained, to impose himself on the world as owner, yet the rule that applies to a bank note, or bill of exchange, or promissory note, is not in Pennsylvania the standard by which to determine the present question. If the true owner, through any fault, omission of duty, or carelessness of any kind, to say nothing of what is not, of course, a wilful parting, enables a wrong-doer to impose upon the world, then the true owner ought to suffer; but, where the bill of lading is merely stolen from him, the law does not shift the title, through a mere possession of it alone.

The plaintiffs' case thus far, if we are right in the law as we state it, and in this view of the facts, stands on a very simple footing. The defendants of record—Shaw & Esrey—appear to have bought here through a broker the cotton in controversy

from Miller & Bro. Now it does not appear that, when the defendants bought, a bill of lading or any muniment of title or anything of the kind was exhibited to them. They bought on samples, and, while their purchase was an innocent and ordinary one in the market, there was nothing to show title by documents such as a bill of lading or anything else. Their case, therefore, if there was nothing intervening, is simply that of a party who innocently buys what did not belong to the seller, and every man knows that he can get no better title than the seller, so that, so far as the defendants' personal relations to the property in question are concerned, they could acquire no title as against the present plaintiff; but Shaw & Esrey have the full benefit of whatever title Miller & Bro., from whom they bought, may have had. If, therefore, Miller & Bro. had a better right than the plaintiffs, Shaw & Esrey have the benefit of that right, because whatever right Miller & Bro. had, they sold to Shaw & Esrey.

This brings us to inquire as to the title which Miller & Bro. set up. They allege that they have, by reason of what occurred between them and Kuhn & Bro., a better title than the plaintiffs, and they rest this allegation of title upon the possession by Kuhn & Bro. of the original bill of lading, and the exhibition of it to them, and transfer of it to them, as security for an advance of $8,500. The Court is of opinion that if there was no wilful or negligent parting with the bill of lading by the true owners of the cotton, Kuhn & Bro. could transfer no better right than they themselves had. If you should find that there was on the part of the plaintiffs or their agents a negligent, not a wilful parting as alleged, but a negligent, parting with the bill of lading, then the title of Miller & Bro. requires consideration under a different light. Then if there was nothing more in the case, Miller & Bro. would get a better title than the plaintiffs, and hence, it becomes necessary to consider a question which I will state thus: did Miller & Bro. know any fact or facts from which there was reason to believe that the bill of lading in question was held as security for an outstanding draft? If they did, they were not innocent takers. I do not mean

that they were not innocent, as between them and Kuhn & Bro. I do not mean that there was any moral fraud but I mean innocent as regards a true owner. It is for you to say how far that transaction with the Farmers' and Mechanics' Bank, and another circumstance which I will mention, may rationally have contributed to induce in the mind of a reasonable person a distrust of the honesty of Kuhn & Bro., in respect of such transactions as that of which you find, in the evidence in question, this is a part. But there is another circumstance, which accordingly as you may view the facts, and they are entirely for you, may or may not induce you to believe not merely that Mr. Miller had reason to distrust, but that he actually did distrust Kuhn, in reference to the very shipment in question, because it appears that when he made the advance of $8,500 on the bill of lading here in question, he telegraphed to a person who represented the carriers to know if all was right. Now, as regards the carrier, a carrier could know nothing except the fact whether the cotton was shipped. I do not want to usurp your privilege: it is for you to say whether you so find, but I suggest for your consideration, that there was distrust on the question whether this cotton, any cotton, or the cotton represented by the bill of lading, had been shipped at all. Would Miller have made this inquiry if he had no distrust of Kuhn & Bro.? Those two circumstances, separately or together, as you may think right, are for your consideration, and upon them, and upon the whole facts of the case, you will say whether you find that Miller knew what gave him reason to believe that Kuhn's title was not all right. If you do so find, then it would be of no importance whether the Bank of North America was negligent or not, because they do not lose their title as between them and Kuhn, and would only lose it as regards an innocent unsuspecting purchaser. If Miller had reason to believe all was not right then he took the risk; there was no fraud, but he was not a child under age, and he knew the risk that he ran, if he doubted the title. It did not impute any want of integrity in him. In fact, I do not know how it is with you, but I rather think all of us are very much in

the habit of running risks of which we know we take the consequences. We take for granted that cheques are not forged, and, we do it perhaps with people we know nothing about, and we may think ourselves very foolish if we get into difficulty, but it does not affect our moral standing, and I say, I do not see anything in this case to raise a question affecting Mr. Miller morally, but the question is whether he has not taken a risk on himself, of which he ought to take the consequences.

You will find your verdict generally for plaintiffs or for the defendants.

The Court requests the jury before their verdict is recorded to answer specially two questions. (1) whether there was any negligence of the plaintiffs or their agents in parting with possession of the bill of lading. (2) Whether Miller & Bro. knew any fact or facts from which they had reason to believe the bill of lading was held to secure payment of an outstanding draft.

The jury found generally for the plaintiffs for the value of the cotton replevied; and as to the questions specially put by the Court, they answered the first negatively, and the second affirmatively. On this verdict judgment was duly entered for the plaintiff.

[More than ordinary weight must be attached to the views of the Court, as expressed in the foregoing charge. The same case had previously been tried before CADWALADER, J., resulting in a verdict for the plaintiffs, but a new trial was granted, because, in view of the subsequent decision of the Supreme Court of the United States in the Merchants' Bank of Memphis *v.* Bank of Commerce (91 U. S. 92), the evidence had not been sufficiently clear that there was an agreement that the bill of lading should be held as security for the payment of the draft and not simply its acceptance.

The charge of the Court was, therefore, although not reduced to writing by the Judge, the result of careful deliberation. The charge was reported by short-hand.

Cf. Henry *v.* Warehouse Co., 2 W. N. C. 389; Barker *v.* Dinsmore, 22 Sm. 427; Steele *v.* Transportation Co., 20 Sm. 188; Decan *v.* Shipper, 11 Casey, 239; Dows *v.* Bank of Milwaukee, 91 U. S. 618; Benjamin on Sales, 721, and cases there cited.]

CIRCUIT COURT. APRIL 25, 1876.

EQUITY.

HARTELL AND LETCHWORTH *v.* VINCY AND OTHERS.

The word "centennial" is common property and cannot be used as a trade-mark.

Bill, answer and proofs.

STATEMENT OF THE CASE.

The bill set forth that the complainants were the original inventors of certain designs for medals for which Letters Patent were granted them in November, 1874, consisting of prospective views of the Centennial Buildings; that the defendants are making and selling medals embodying the same designs as those described in said letters patent. Also that the complainants had registered in the Patent Office in May, 1873, as a trade-mark, "the word 'Centennial' applied in a suitable manner to medals of any shape made of hard rubber or metal or plaster, either stamped, moulded, cast or engraved;" that defendants have used said trade-mark upon large quantities of medals in violation of complainants' rights; that letters patent were granted to John H. Shreiner, one of the defendants, in May, 1875, for a design for medals the same as that whereof the complainants are the original inventors and patentees, and that this wrongful issue results to their irreparable injury.

The bill prayed a decree that defendants' letters patent be declared void; an account, and an injunction restraining the defendants from making and selling said patented designs.

The answer denied the use of the complainants' trade-mark in any way in connection with medals, excepting that defendants have used the word "Centennial" upon lids of paper boxes containing wooden medals, and averred that the trade-mark registered by complainants is limited to medals of metal, hard rubber or plaster, and has no application whatever to articles or medals made of wood and averred that the word "Centennial" as a trade-mark is invalid. It also denied infringement, on the ground that complainants' design was for a prospective view,

while the defendants' was an elevation of the Exhibition Building.

M. Daniel Connolly, for the complainants.

Our trade-mark goes back to 1873, and we have letters patent for designs for medals for the Art Gallery and Main Exhibition Building.

[CADWALADER, J. Your claim is to a monopoly in the subject, not alone in the trade-mark?]

Yes, as applied to medals.

[CADWALADER, J. You contend that the word "Centennial" is good as a trade-mark for medals generally. Under the act of 1871, it seems to me the world at large are entitled to be competitors at the exhibition, and that the word "Centennial" is common property.]

Nearly all trade-marks are words in use as common property, but in our case there is no name of a person, and hence we are not within the statutory prohibitions. A word used as a trade-mark must not be generic or a mere geographical designation, as was the case of the word "Lackawanna." *Delaware and Hudson Canal Co. v. Clark, Official Gazette, U. S. P. O., Vol. 1, No. 13, page 279.* But there is no objection to a trade-mark as merely suggestive. We claim an exclusive property in medals of this mark.

[CADWALADER, J. If you have a property you should assert it at law so as to ascertain whether you could get damages. In equity there is no appropriate remedy where the question of law is doubtful. This is a question of damages and it is extremely doubtful whether a Court of equity would not say the case is too doubtful for an injunction. Make out a title if you can at law.]

We claim under act of Congress of July 8, 1870, § 71; we first applied the design, and are entitled broadly to its application, and, on the principle of the *Gorham Manufacturing Co. v. White Whitman's Patent Cases, 392,* there is an infringement.

E. K. Nichols, contra.

Bill dismissed.

DISTRICT COURT. MAY 13, 1876.

ADMIRALTY.

GRIFFENBERG *v.* THE BARKENTINE, JOHN LAUGHLIN.

1. Masts and spars furnished to a vessel while she is being built are not maritime supplies.

2. An Admiralty Court has no jurisdiction under the statute of the State, *infra*, or otherwise, to enforce a lien against a vessel where the demand is not distinctively for maritime supplies.

LIBEL against the barkentine, John Laughlin, brought by one Griffenberg for mast and spars furnished by him to said vessel as supplies.

The libellant claimed a lien under the Act of Assembly of Pennsylvania of 13 June, 1836, § 1. The hull of the vessel was built and completed at Seaford, Delaware, and was taken up to Philadelphia to be rigged. A contract was made with the libellant in Delaware to furnish the necessary masts and spars etc., which were prepared and finished in Wilmington, and then towed up to Philadelphia to be fitted in the hull.

Coulston for libellant, claimed that under the case of the Lottawana, 21 Wall, 558, a lien existing under the State laws for materials furnished in fitting out a vessel could be enforced by proceedings *in rem* in admiralty.

Flanders, contra, contended that a court of Admiralty had no jurisdiction to enforce such a lien citing—

People's Ferry Co. *v.* Beers, 20 How. 393.

Roach *v.* Chapman, 22 How. 129.

CADWALADER, J.

Whether there was a lien under the Pennsylvania Statute is an immaterial question, because the demand is not for maritime supplies, and if it had been, the place of supply would have been the home port of the vessel. The demand arose before she was equipped so as to be in a condition to receive supplies in the distinctive sense of this word.

The libel is dismissed for want of jurisdiction.

DISTRICT COURT. NOVEMBER 10, 1876.

PRACTICE.

DETMOLD *v.* THE GATE VEIN COAL COMPANY. SAME *v.* FISHER.

Affidavit of defence law. Averments tending to extend and not limit a claim are not within the rule allowing such averments. *Semble,* that the two-term rule based upon the old Pennsylvania practice may be acted upon in a case not within the affidavit of defence law.

MOTION to set aside judgment.

Judgment in this case had been entered by default for want of an affidavit of defence, upon copy filed of an agreement in writing, whereby the company defendants agreed to ship and consign to plaintiff, within a specified time, a certain quantity of coal to be sold by them at a certain commission. The plaintiff was to make advances on such shipments, a bond of indemnity being given to secure them against loss, of which a copy was also filed. With these copies plaintiff filed an averment that the agreement had not been performed, whereby the plaintiff was entitled to judgment for the amount of commissions upon the sales of the coal which should have been shipped; and also for a balance due on account of advances, as shown by a copy of book entries filed therewith.

An affidavit was filed by defendants denying breach of the agreement, and averring that the copies filed, with the averments were not such as to entitle plaintiff to judgment under the affidavit of defence law.

Dallas, for the plaintiff.

Judgment is asked upon the copies of the agreement and the bond of suretyship, and not upon the copy of book account, which latter is filed with the above instrument merely as an averment to liquidate the plaintiffs' claim, and to assist the clerk in assessing the damages. *Frank v. Maguire, 6 Wright, 81.*

F. W. Hughes, for the defendants.

Breach of the agreement is alleged in general terms. The instruments of writing upon which suit is brought are for the payment of money at a future time, the consideration being

executory, and the demand is for damages for the breach of agreement, dependent upon facts *dehors* the record. They are not within the affidavit of defence law. *Montgomery v. Johnson, 1 Miles 324. Bank v. Blackiston, 2 id. 358. Commonwealth, etc. v. Hoffman, 24 Smith 105.*

CADWALADER, J.

Judgment would be granted upon the copies as filed, if it were not for the fact that copies of the book entries, filed to assist the assessment of damages, tend to extend and not limit the claim, as shown by the copies of the instruments of writing. Such a purpose is not within the rule allowing averments to be filed with copies of instruments.

Judgment in each case vacated without prejudice to the right of the plaintiff to move for judgment, in accordance with the practice under the old second term rule, for default of affidavits alleging defence, and the amount thereof; but defendants have leave to file such affidavit in each case.

The following order was entered of record.

"And now, to wit, this 15th day of November, A. D. 1876, the Court orders the judgments to be vacated as having been unadvisedly entered, but without prejudice to any right of the plaintiff to move for judgment for want of an affidavit of defence under the rule and practice which is in that behalf independent of the Statute law of the State."

NOTE. See an interesting note added to the report of this case in *3 W. N. C. 567,* upon the origin and development of affidavit of defence law.

DISTRICT COURT. NOVEMBER 24, 1876.

ADMIRALTY.

HART AND OTHERS *v.* THE SCHOONER ENTERPRISE.

The wages of seamen for maritime services constitute a lien on the vessel, although the contract for the services was made with the charterer.

LIBEL and ANSWER.

Claim for seamen's wages. The libel alleged that the vessel being at the Port of Philadelphia and bound on a voyage thence to ports on Chesapeake Bay and elsewhere and return, the master, by himself or his agent, hired the libellants to serve as seamen during the said voyage; that no shipping articles were signed and that libellants had duly performed the voyage and were justly entitled to their wages, etc.

The answer of the master set forth that before the alleged hiring the vessel had been duly chartered by the owners, and that the charterer agreed to pay for its use and all expenses of the voyage, including the wages of respondent; that the charterer was on board from the beginning of the voyage all the time, and had full control over the vessel; respondent, as navigator, merely having authority to dismiss any of the crew who misbehaved; the libellants had not been hired by the owners nor by their agent, but by the charterer; that they knew that the vessel was chartered and were notified that they must look for their wages to the charterer and not to the respondent; that the vessel moreover was not chartered for any maritime adventure or voyage, but that libellants were employed as laborers, to go in the vessel through the Delaware Canal to obtain a cargo of oysters, and not to transport them to any maritime port; but to convey them to Jones' Creek on Delaware Bay, and there plant them, and that the vessel had been so engaged in the business of planting oysters.

Rich and *Driver*, for libellants.

Flanders, contra, argued that the vessel was not liable because no one but the master could create a lien, and the contract in this case was made by the libellants with the charterer, and that the Court had no jurisdiction because the services were not maritime.

CADWALADER, J., was of the opinion that the vessel was charged with the debt and that the services performed were maritime services.

Decree for libellants with costs.

DISTRICT COURT. JANUARY 26, 1877.

ADMIRALTY.

THE SCHOONER ADDIE WALTON *v.* THE BARQUE LIGHT BRIGADE.

1. In a case of collision the greater or less degree of negligence will not be considered where both vessels are in fault; any degree causing damage will render a vessel responsible.

2. Degrees of negligence are disregarded where skill is in question, or where the risk is dangerous.

LIBEL in a cause of collision.

The collision in this case occurred in Delaware Bay on the morning of September 16, 1876, near what is known as the "Joe Flogger buoy," the two vessels coming almost head to head, and resulting in the almost immediate sinking of the schooner and the drowning of one of her crew. The barque also was greatly injured. Cross libels were exhibited and the cause was referred to assessors. The testimony appears to have established a case of mutual negligence, especially in the keeping of a proper lookout.

CADWALADER, J.

The Court, having considered the report of the assessors, observes that it is immaterial when the schooner may have been sighted by any of the men who were on the lookout on board of the barque, unless the schooner was reported in season to the officer of the deck of the barque as in sight.

On the question of the greater or less degree of negligence, where both vessels are in fault, the rule is that where human life and valuable property are at stake, any negligence causing damage renders a vessel responsible. Even where the litigation is between parties to a contract, degrees of negligence are disregarded when skill is in question or where the risk is dangerous (see the cases in 14 and 16 Howard's Reports). The reason is stronger where, as in this case, there is no privity of contract between the litigants.

In this case there is no doubt that the disaster could readily have been prevented if either vessel had had a proper lookout

whose duty was properly performed, and that the negligence of each vessel consequently contributed to the fatal result.

Each vessel is therefore condemned in half the damages suffered.

DISTRICT COURT. MAY 18, 1877.

ADMIRALTY.

THE FRANCESCA CURRO *v.* WRIGHT.

1. A stipulation in a charter party for the commencement of a voyage within a certain time, is fulfilled, if within the period a vessel is made completely ready for sea and has made a certain measurable progress, although small within the harbor limits in the direction of her destination.

2. In such a case the use of sails is not indispensable. The commercial world is entitled to all the benefits of towage in modifying the definition of progress.

LIBEL in a cause of contract. Breach of Charter Party.

STATEMENT OF THE CASE.

The barque in this case was lying at the Port of Genoa, in December, 1876, when she was chartered by the respondents to proceed either to Philadelphia or Baltimore, where she was to receive a full cargo of grain, and then to proceed to one or other of certain ports in the United Kingdoms and discharge her cargo agreeably to orders. Among other things it was agreed that she should sail from Genoa in ballast in the month of December. It was claimed by the respondents that this stipulation was not performed, and upon the fact whether she did so sail, the controversy turned. The respondents conceiving that they were relieved from the obligations of the charter party by the alleged breach in this particular, refused to furnish cargo when the vessel arrived at Philadelphia, but some days afterwards made a new contract with her at a lower rate of freight, the rate having fallen during the interval. The libellants alleging that there was no default on the part of their vessel claimed damages for this difference of freight, for the detention and certain expenses.

It appears from the assessor's report that on the 30th

December, 1876, the vessel having her papers and being then in readiness for the voyage got out from among the shipping in the harbor of Genoa and proceeded about three-quarters of a mile towards its mouth and anchored. The wind was then dead ahead and it continued to blow from the same quarter for several days. She might have gone to sea with tugs, but she was in ballast only. She was not in a condition nautically to contend with such a wind on a lee shore, taking into consideration the stormy season of the year. It would have been the height of imprudence for her to have gone to sea that day. It was on the 4th January when she actually got out to sea with the aid of a tug.

The assessor's opinion was that these facts did not constitute a commencement of the voyage, but merely a shifting of berths preparatory thereto. He refers to the crowded condition of small ports like Marseilles and Genoa as making such movements necessary, and that the vessels while making them are always under the control of the harbor authorities.

The cause was re-argued May 17, before CADWALADER, J., and CAPTAIN YOUNG, who had been requested to sit with him as an assessor.

Flanders, for libellants. It is admitted that the stipulation is a condition precedent, but it has been performed. Entire readiness to go to sea within the time fixed and an actual movement, however short the distance, in the prosecution of the voyage, is in contemplation of law, a sailing if the delay arises from *vis majors.*

Arnould on Insurance, p. 554—Maclachan.

Pettigrew *v.* Pringle, 3 B. & A. 520.

Bond *v.* Nutt, Cowper, 607.

Fisher *v.* Cochran, 5 Sym. 496.

Wilson and *Ward,* contra, All the books require besides readiness a movement with the *bona fide* expectation of at once prosecuting the voyage.

Arnould on Insurance (*Supra*).

1 Philips on Insurance, § 773.

The case of Pettigrew *v.* Pringle (*Supra*) does not apply because the ship was not ready within the time fixed.

In Bond *v.* Nutt (*Supra*) and Earle *v.* Harris (Doug. 357) there was an actual sailing of five miles.

Cochran *v.* Fisher (*Supra*) was especially confined by the Court to similar cases, viz. time policies where there was no *terminus a quo,* as in this case.

The case which governs this is Nelson *v.* Salvador (1 Moo. & M. 309).

The movement cannot have been with the *bona fide* intention of at once going to sea, because the master admits he knew he could not do so. The direction of the movement throws no light upon the question of intention, because he could have gone in no other direction. On account of the nature of the Harbor of Genoa the vessel could not be said to be ready for sea until she had arrived at the second anchorage.

CADWALADER, J.

After the argument of this case, I asked one of the nautical experts on whom I frequently call to act as assessors, to read the papers and let me know his opinion. I had no definitive purpose to refer the case for his formal assistance. But he naturally understood the question to be such a reference and has reported accordingly. The report may be filed.

I do not concur with him in opinion. The case, in my opinion, is less one for the decision of a nautical assessor than for consideration by the Judge of a Court of Admiralty. I also think that the question to be decided is one rather of fact than of law.

The vessel was not beyond the jurisdiction of the local authorities of the Port of Genoa until the 3d of January. I am of opinion that she had nevertheless sailed before the end of December. Before the end of that month she was completely ready for sea, had on board all necessary papers, and had broken ground. This was not enough to constitute a commencement of the voyage. But there was, in addition, a certain progress made in the direction of her destination. This progress, though small, was measurable. It placed her near the mouth of the

harbor where the time, space and labor of ulterior progress were already abridged. This occurred on the 30th; and on part of that day, and the whole of the 31st, she was only prevented by continuance of the head wind from running out. It may be that before the use of steam towage she could not have made the progress which was actually made. But I cannot acquiesce in the suggestion that progress by the use of sails was indispensable. The commercial world is entitled to all the benefits of towage in modifying the definition of progress in such a case.

Decree for libellant with costs.

October 17, 1877. On appeal the case was argued by the same counsel.

Eo die. Decree affirmed with costs.

NOTE. See WRIGHT *v.* The Francesca Curro: post.

DISTRICT COURT. DECEMBER 21, 1877.

ADMIRALTY.

WRIGHT *v.* THE FRANCESCA CURRO.

Charter Party.—Two charter parties executed simultaneously for successive voyages—validity of second dependent on performance of the first. Effect of a reference to the first on the margin of the second.

LIBEL for breach of charter party.

The libellants had chartered the barque *Francesca Curro,* then at Genoa to sail from Philadelphia to a port in Great Britain, it being expressly stipulated that she should sail from Genoa for Philadelphia during the month of December, 1876. Upon her arrival here in February, 1877, the libellants refused to receive her under the charter alleging that she had not sailed during December. Freight having fallen, they re-chartered her for the same voyage on exactly the same terms except at a lower rate of freight, and an action brought to recover the difference was decided by this Court in favor of the vessel. *Ante.*

The decree was paid by the present libellants, and the voyage performed under the re-charter.

Upon the same day that the original charter had been made, a second one was also made of the same vessel by the same parties. This charter was headed "Second Voyage," and in the margin were written the following words:—

"It is agreed and understood that the vessel being already chartered for a previous voyage has after completion of same to return to Delaware Breakwater for orders, without delay and in ballast, to enter upon this charter."

After the completion of the voyage under the re-charter, the vessel returned to Delaware Breakwater and the master telegraphed her arrival to his agents in Philadelphia, who notified the libellants and asked for orders. The libellants thereupon ordered the master to Philadelphia and he came and laid up at a dock.

The libellants then ordered the vessel to Girard Point for loading, but the master refused to go, alleging that the libellants, having broken the first charter were not entitled to the benefits of the second. Freights having advanced, this action was brought upon the second charter to recover the difference.

Henry Galbraith Ward, for libellants.

The contracts made in this case were to be performed or paid for. The dependence of the second on the first was merely to secure two consecutive voyages which could only be secured by referring in the second charter to the first. The first voyage was readily performed, though not under the original charter, and the respondents were bound, therefore, to perform the second, there being nothing but the rise in freights to prevent it.

Only so far as the conduct of one party prevented the performance of the contract, will the other be excused.

Dubois *v.* Canal Co., 4 Wend., 285.

In this case the conduct of libellants did not prevent performance, and the ship reported to the libellants on her return from the first voyage for orders. In the first suit the ship complained only of the breach of the first charter, damages were only awarded for that, and those damages have been paid.

Henry Flanders, for respondents.

The contract was in substance a single one providing for two voyages. The first was never performed through the acts of libellants: therefore the second was impossible of performance.

THE COURT dismissed the libel with costs.

DISTRICT COURT. AUGUST 10, 1877.

ADMIRALTY.

THE PELLEGRA MADRE *v.* WRIGHT.

A stipulation in the charter party that the vessel shall be ready and prepared for cargo before the time allowed for loading shall begin, should, in the absence of express agreement, be reasonably interpreted as to the matter of ballast, so that it shall be consonant to established custom and admit of the fair judgment of the master as to what is requisite.

LIBEL for demurrage.

STATEMENT OF THE CASE.

The claim under this libel was for demurrage. The facts were briefly these: The vessel was chartered by respondents for a voyage from Philadelphia to some port in the United Kingdoms for orders with a full cargo of wheat. It was stipulated that thirty-five running days should be allowed the charterers for loading, to commence when the vessel was "all ready and prepared to load." The master notified the respondents that his vessel was ready and prepared. On an examination by the surveyors of the board of marine underwriters she was declared not so to be; the ground of their opinion being that she was then in ballast or partially so, and that for the cargo she was required to carry she should be entirely empty. It was argued that she was not "prepared" in the sense of the contract until she was furnished with ballast logs, a contrivance requiring no consumption of space.

It was claimed on the other hand that the ballast *found* on board was required before and during the loading as a measure of safety, being what is known as stiffening; capable of removal

as circumstances required, conformable to usuage, and rested in the judgment of the master.

The contention on this subject was prolonged beyond the stipulated time for loading and the vessed thereby detained. The suit was to recover demurrage at the rate therefor mentioned in the contract.

Mr. Flanders, for libellants.

Messrs. Wilson and *Ward,* for respondents.

CADWALADER, J.

Some extreme propositions which are stated absolutely by the witnesses must be qualified so as to have a restricted and relative application. The question to be decided is, not that of the master of the vessel without any ballast in her asking to take in some ballast for temporary stiffening. I am not required now to decide whether, in such a case, the merchant charterer could reasonably suggest a substitution of the new appliance of ballast logs on her outside. When that question arises, it may be possible that special considerations will, in peculiar cases, be more or less applicable. However that might be, the present case is different. It is the case of a vessel, already in ballast, whose master insists on retaining in her, a sufficient part of the ballast to keep her stiff, until a sufficient portion of the intended cargo shall have been taken in, to dispense with ballast stiffening.

With reference to such quantity of the ballast as he proposed thus to retain temporarily, and to the other circumstances of the case, I do not think that this requirement by the master was unreasonable, and I think that the objection to it by the charterers was arbitrary and unreasonable. Their objection was that the ballast logs must be substituted instead of temporary ballast stiffening, and that the whole former ballast must be absolutely taken out before any part whatever of the intended cargo should be put in. This would be an innovation which, without a conventional stipulation for it, they cannot insist on.

Decree for the libellants, with costs, with leave to the respondents to show by affidavits whether any, and if any, what deduction should be allowed by reason of increased time in taking out the retained ballast.

DISTRICT COURT. AUGUST 27, 1877.

CRIMINAL LAW.

THE UNITED STATES *v.* EDWARD CLARK.

1. The Act of Congress which makes it criminal to obstruct or retard the passage of the mail, applies where the mail is carried by rail in a passenger train which is unlawfully stopped by persons who are willing to permit the passage of the mail car detached from the passenger cars of the train.

2. Words used by such persons may be acts of obstruction when they constitute part of the wrongful business in question.

THE DEFENDANT was indicted under §3995 Rev. St., for knowingly and wilfully obstructing and retarding the passage of the mail and of the carriage carrying the same.

The evidence on behalf of the prosecution was that the defendant was one of a number of persons who assembled at the depot of the Lehigh Valley Railroad at South Easton, in this district, on the morning of the 27th of July last; that on the arrival of the mail train from Mauch Chunk to Phillipsburg, at the depot on that morning, the defendant, who had no connection with the train, said to persons having charge of it, that the mail car could go on, but not the rest of the train; and that he afterwards got on the train and with others placed it in a siding, where it remained for several days.

District Attorney Valentine and *Assistant District Attorney Gilpin,* for the United States.

Benjamin L. Temple, for defendant.

CADWALADER, J., charged the jury.

The defendant is charged with retarding the transportation of the mail. The first question is, whether any body committed the offence; and the second question, whether the defendant

participated in its commission. It will be convenient to consider those two questions separately.

The mail, in point of fact, was retarded, as the postmaster testifies, two or three days. The occurrence which retarded it, according to the tendency of the proofs, was that several persons were assembled at the depot at Easton, for no lawful purpose, and that one or more of them declared that the mail might go on, but the passenger train should not. They uncoupled the mail, and afterwards coupled it for the purpose of carrying it as they did, to a siding. If that was the fact, and their purpose was to retard the train which transported the mail, it matters not in point of law whether they were or were not willing that the mail car or baggage car, or the particular vehicle carrying the mail, should go on. I had occasion, a week ago, to define the law on that subject; and when I had reached my home in the evening I found that the afternoon mail had brought me the Chicago Legal News, containing Judge Drummond's opinion on the same subject; and although I cannot recollect the words which I used, the words are so nearly identical that I cannot now discriminate between what I said and what he said. The substance of it is that from the foundation of the government of the United States, under the present Constitution, the mails have been carried in the same vehicles or trains which also transport passengers. The public authority, and no private person, regulates the method of transportation. As Judge Drummond said: "In relation to the transportation of the mails by means of railroads it is true that it appears by the evidence in this case that these defendants were willing that the mail car should go, but it must be borne in mind that the mail car can only go in such a way as to enable the railroad to transport the mail where there are other cars accompanying it. It is not practicable, as a general thing, for a railroad to transport a mail car by itself, because that would be attended by serious loss, so that while nominally they permitted the mail car to go, they really, by preventing the transit of other passenger cars, interfered with the transportation of the mails."

There is a familiar proposition of law that where a person

is concerned in performing an unlawful act, he is responsible for other unlawful acts which he commits in the course of the wrong that he intends to commit. If a man intends to strike A with a stick, and he strikes B and breaks his head, he cannot get off by saying to B, "I did not mean to strike you, I meant to strike the other man," That the purpose was here not to delay the mail is of no importance if the act done was an unlawful act, and its effect was to retard the transportation of the mail.

This question came before the Judges of the Supreme Court of the United States about nine years ago.* They said that if a man stops the mail when he is doing a lawful act, such as arresting a criminal who is a passenger, that is not obstructing the mail. The Supreme Court, however, added these words: "When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object."

These propositions are not disputed in the present case. I believe counsel candidly admit the law to be so. But when we come to consider the facts presently, it will be found useful to have thus ascertained how the law is laid down.

If you believe the evidence, there is, I think, no reasonable doubt that the offence in question was committed by somebody; that the transportation of the mail at this place, and from it, was unlawfully retarded.

Then the second and main question is, whether the defendant was a guilty participant. If he participated in any wise intentionally in what brought about the result, he is guilty.

It may become in this case material to define another rule of law, which is to determine when *words spoken* are *acts*. A witness who says a man did nothing, may nevertheless prove that he did something by words. It thus becomes important to know when spoken words constitute either acts of guilt or evidence of guilt. In some cases it is, in others it is not, a

* 7 Wallace, 486.

difficult question. In the present case I can state the rule in a simple and intelligible way, and it will be for you to apply it, or to reject its application. The rule is, that where words constitute part of the business, rightful or wrongful, which is in question, they are acts. If, therefore, one of the crowd there said, in defining their purpose, that the mail might go on but the passenger train should not, if such words were uttered when the transaction was in progress, and as a part of it, the man who uttered those words committed a wrongful act if the jury find that such was his intention.

Let us apply the evidence in this case. But before doing so I will make another discrimination, so as to simplify the question which we are ultimately to reach. It is contended by the defendant's counsel that if, for any reason, whether for protection of the mail or any other cause, it was taken out of the car which was pushed into the cut, from that time there was no offence to be committed, that from that time the progress of the offence was ended. Consider that a moment. If, for the safety of the mail, or for the purpose of assorting it, or for any other purpose, it was temporarily taken out of the car, how is it the less retarded if the unlawful act prevented it from being taken back to the car and carried forward? Mr. Dawes, the postmaster, has testified that the mail was delayed three days. At what point of time was it delayed? Suppose somebody had gone and locked or unlocked the door in execution of the general design, would that not have been part of the act of delaying? The question, therefore, is, not where the mail was, but whether it was delayed.

And now we come to the particular evidence which is to determine the guilt or innocence of the present defendant. The weight of the evidence, I think, is in his favor on one point; and that is that the original uncoupling of the car had occurred before he reached the place. The witnesses on his part so testify; and although the apparent tendency of some testimony of witnesses for the prosecution was, as one would first listen to it, the other way, yet I see no necessary contradiction; and we may take it that according to the weight of the

evidence he did not arrive there with his two companions until that part of the acts committed was consummated. But that he was there before the car was wheeled to the siding, the evidence on his part tends also to prove; and if that is so, and, if Mr. Lewis is correct in stating, as he did twice in his evidence, that the defendant himself said that the mail car should go no further, then there is sufficient evidence in law for the conviction of this defendant, if you find it sufficient in fact.

Mr Lewis's testimony is distinct. He said: "I recollect the train; the 27th of July; when it came in a big crowd there mounted the train; said it should not go further; saw defendant there, heard him give orders, heard him say that the mail car should go but not the rest of the train." Whether that occurred before or after the actual taking out of the mail, if it was in part execution of the whole transaction, it retarded the mail for two or three days. If, I say, you find, without any reasonable doubt, that the words which Mr. Lewis has uttered here were really uttered by the defendant, and were uttered with the object and purpose of preventing, by intimidation or otherwise, the progress of the mail, then, as I said before, the evidence is sufficient in law, if it satisfies you in point of fact without any reasonable doubt. If you have any reasonable doubt you will give the defendant the benefit of it and acquit him; but if, as men of business, you have no reasonable doubt, you should find a verdict conformable to your real belief.

There is some evidence tending to show that, in ordinary times, persons mount these passenger trains, or other parts of the train, and perhaps also baggage and mail trains, in order to go from one side of the river in Pennsylvania to the other in New Jersey, and that that is allowed without charge. If you believe that that was really the errand of this defendant, you should give him the benefit of it as a strong reason of presumption in his favor. But you should also recollect that, according to the evidence, there was a large crowd there, some of whom had already declared that the train should not proceed with the passenger part of it; and you will recollect that the period when, according to the evidence, this defendant mounted the

train, if he did mount it, was after it had been declared that the train should go no farther, and after it had been uncoupled, if you so find; but if you also find that he was a participant in moving it to the siding, whether the mail was in it or not, provided that part of the acts was in execution of the general purpose of retarding the mail, then that part of the evidence would be of much less importance. You will give it such weight as you think it is entitled to.

The District Attorney states that I have made a mistake. He says that the mail, according to the evidence of Mr. Dawes, was sent on the same afternoon, that instead of being delayed two or three days it was delayed only say two or three hours. But that would make no difference in point of law if the evidence convinces you that it was wilfully delayed. The main question, I think, for you, is, whether the defendant was one of those who declared, as Lewis testifies, that the passenger train should not go on though the mail train might.

The counsel for the defendant understood the evidence as though it were a regular thing to take the train to this cut or siding. If he is right, give the defendant the benefit of that view of the evidence. But the testimony is that the train was coupled, after having been uncoupled, and that it was carried to the siding and left there.

I believe, gentlemen, I have said all that occurs to me as necessary.

The jury rendered a verdict of guilty.

DISTRICT COURT. SEPTEMBER 7, 1877.

ADMIRALTY.

SMITH *v.* THE SARAH S. HARDING.

1. In a libel in a cause of possession an agreement that the question of possession shall be "settled upon the arrival of the vessel at Philadelphia," should be averred to be in writing, preliminarily to its judicial cognizance.

2. In such a cause when the master is the libellant, the libel should contain an allegation that he has navigated the vessel with competent

skill and faithfully for the interest of all concerned; that he stands ready to account for and pay forthwith any amount that may be due by him and that he is able and willing to give security for the future.

LIBEL for possession at the suit of the master and owner of one thirty-second part of a vessel.

The libel averred, *inter alia.* An agreement with the libellant by a former majority of owners that he should build and sail the vessel; and an "understanding" at the time of his displacement by a subsequent majority that the question of possession should be settled upon the arrival of the vessel at Philadelphia.

Exceptions to the libel were filed:

1. That the displacement by the master was by the majority of the owners, and in pursuance of their right.

2. That the alleged agreement and understanding were void and of no binding force.

The questions decided are sufficiently indicated in the opinion, and in Judge Cadwalader's allocatur endorsed on the libel. The allocatur is as follows:

"1877, August 3. The libel cannot be allowed without amendment, nor after amendment without great difficulty and limiting rigidly the purpose or purposes for which it may be allowed. In this primary stage of the proceedings, the libellant must at least amend by averring that he has heretofore navigated the vessel with competent skill and faithfully for the interests of all concerned, and without any neglect of his duties as master or otherwise; that he is ready and willing to account etc., and to pay forthwith such amount, if any, as may be due by him, and that he is also able and willing to give security to such extent as may be reasonably required for the future. If these amendments shall be made, the clerk may allow the libel and issue a citation to show cause as prayed in the libel with a warrant for the arrest and detention of the vessel till further order, with leave to any party interested to move on short notice for such order as the case may from time to time require."

Mr. Edmunds, for libellant.

Mr. Flanders, for respondents.

CADWALADER, J.

This case was heard on the exception of the parties named as defendants to the sufficiency of the allegations of the libel to sustain the jurisdiction of this Court; and, after argument by counsel, the Court referring to the allegation of an "understanding that the question of possession was to be settled upon the arrival of the vessel at Philadelphia" is of opinion that such an understanding, if otherwise judicially cognizable, is of no effect unless it was in writing.

Wherefore it is ordered that unless the libel be sufficiently amended under this head within three days, it be dismissed without prejudice, etc., but without costs.

NOTE. No further amendment was made and the libel was dismissed.

DISTRICT COURT. SEPTEMBER 14, 1877.

ADMIRALTY.

SMITH, MASTER OF THE SCHOONER R. S. GRAHAM *v.* S. AND W. WELSH.

1. In case of wreck, freight is payable on each cask of sugar landed, provided a quantity equal in value to the stipulated freight remains in the cask.

2. Expense of transshipment to port of destination is a charge upon freight alone.

3. Expense incurred in bringing a vessel into port, after separation of cargo, is a charge in the vessel alone.

LIBEL sur Contract.

This was an action for freight instituted by the master of the schooner *R. S. Graham* against S. and W. Welsh on the 529 hhds. and 200 boxes of sugar from Havana to Philadelphia, amounting to $2,130.00. The vessel while prosecuting her voyage, was cast ashore on the coast of Maryland. The vessel and cargo was placed by the master in the hands of wreckers. The cargo was landed from the vessel, some of the packages being nearly empty; but the libel alleged that no pack-

age when landed contained less than 100 lbs. of sugar. The contents of the hhds. and boxes partly full were placed together so as to constitute, with the full hhds. in all 270 hhds. and 180 boxes, which were sent overland to Philadelphia and delivered to the consignees at an expense for land carriage of $1,743.26.

After the cargo was landed from the vessel, she was floated off from the beach and brought to Philadelphia by means of steam pumps furnished by the wreckers.

Flanders, for libellants, argued that the libellants were entitled to full freight on each cask landed on the beach which contained sufficient sugar to pay freight, and that no deductions were to be made from freight for charges of land transport; that the saving of the cargo and the vessel was one continuous transaction, entered into by the master for all interests concerned; and all expenses until arrival at Philadelphia, were chargeable in general average on ship freight and cargo, to which the freight would contribute for its full amount, and cited—

Lowndes on General Average, p. 104.
Bevan *v.* The Bank U. S., 4 Wharton, 301.
McAndrews *v.* Thatcher, 3 Wallace, 347.

M. P. Henry, for respondents.

Where the voyage is not performed, no freight is recoverable on the charter party; but the claim of the ship is for what is designated as equitable freight, according to the benefit derived by the merchant. It is on this principle that freight *pro rata itineris* is allowed.

Frick *v.* Barker, 2 Johns, R., 327.
Nelson *v.* Stephenson, 5 Duer, 538.
Cook *v.* Jennings, 7 Term R., 381.
Post *v.* Robertson, 1 Johns, Rep., 24.
Lutwidge *v.* Grey, reported in Abbott on Shipping, p. 333.

Deductions from freight must be made for the amount of the cargo lost, and also for the amount consumed in salvage.

Luke *v.* Lyde, 2 Burr., 889.

Pinto *v.* Atwater, 1 Day, 193.

The cost of transshipment is a charge solely on the freight; any excess above charter freight is a charge upon cargo.

Thwing *v.* The Wash. Ins. Co., 10 Gray, 443.

Cutts Adm. *v.* Perkins, 12 Mass., 206.

Coffin *v.* Stover, 5 Mass., 352.

Lemont *v.* Lord, 52 Maine, 365.

Where there is an actual separation from the vessel, the cargo does not contribute in general average to the subsequent expenses of saving the ship.

McAndrews *v.* Thatcher, 3 Wall., 347.

CADWALADER, J.

This case having been argued by counsel, the Judge said: I think that the whole stipulated freight, as upon a full package, is payable on every package which retained its whole contents, or a quantity equal in value to the stipulated freight on such package; and that the stipulated freight should be thus assessed as if the packages partially emptied had not been refilled, but had reached Philadelphia and been delivered in their condition of partial emptiness.

I am also of opinion that any extraordinary charges of transportation which were necessarily incurred by the defendants are allowable as the deduction from the freight otherwise due.

I cannot, at present, perceive that, as between the parties here litigant, any question of general average can so arise as to affect the computation of either the freight or the deduction. But on this point a definitive opinion is not expressed under either head; and the subject may be elucidated by a *pro forma dispacheur's* adjustment if either party desire to exhibit it.

October 26, 1877.

Afterwards, a partial *pro forma* adjustment having been exhibited, the judge said:

The decision of this case may be prefaced by the remark that the Log Book shows the stranding to have been involuntary,

and not in any proper sense voluntary. The vessel could not have been kept from the beach.

This point, however, seems to be immaterial, and I mention it only because the stranding is described by the libellant as voluntary.

Recurring to the original question considered at the close of the former hearing, I retain my opinion then expressed as to the proper mode of estimating the freight which is to be allowed in the first instance.

The remaining question is what amount should be allowed by way of deduction from freight, and reimbursement of the excess, if any, of charges on the cargo above the freight.

On this point I am of opinion upon the facts that the services for saving the vessel were not with a view to making her the vehicle of continuing transportation of the cargo. Therefore the charges incurred in order to get her afloat were essentially distinct and different from those incurred for getting the cargo to its destination; consequently the case does not fall within the rule ordinarily applicable where the peril has originally been a common one.

The accidental fact that the salvors were the same persons and the contract was a single one as to both vessel and cargo, does not, in itself alone, suffice to make the charges of both kinds a common burden upon both subjects. The charges must be apportioned, those incurred for getting the vessel afloat being assessable upon her, and those incurred in making the cargo transportable, and in transporting it, being assessable, first upon the freight, and afterwards, if in excess, upon the cargo.

If the libellant desires a reference to a commissioner to report whether any, and if any, what amount is due to him for freight upon the above principles, the reference will be made. Otherwise the libel will be dismissed.

Oral opinion by CADWALADER, J.

DISTRICT COURT. NOVEMBER 14, 1877.

ADMIRALTY.

THE BRIG MURIEL.

WILLIAMS *v.* SHALLCROSS, OWNER AND CONSIGNEE.

Part of a perishable cargo in a voyage of extraordinary duration at an unfavorable season with weather at times tempestuous, was lost, the proximate cause of loss being wetting by sea water. In this state of facts, in the absence of preponderating evidence that there was bad stowage, the vessel was not responsible in damages for the cargo.

1. LIBEL by Shallcross, owner and consignee of a cargo of potatoes, against the brig Muriel, for loss of a part of the cargo by wetting by sea water.

2. LIBEL by Williams, master, against the cargo for freight.

In December, 1876, Hyndman shipped a cargo of potatoes upon the brig, to be carried to Philadelphia, freight at the rate of twenty cents per Winchester bushel, payable on the "output" by consignee. The master signed bills of lading by their terms exempting the ship from liability for loss arising from "perils of the sea," and receipting for 8,390 bushels, "more or less."

Upon arrival, the master delivered to Shallcross, who had purchased the bill of lading, 6,937 bushels in good condition, but the balance had become utterly destroyed by the action of sea water, and was a mere mass of mash. The consignee refused to receive this part, or to pay freight therefor. The master then shovelled the mash overboard, without any measurement of its quantity, and sued for his freight.

The suit for damage, being the first of the above actions, was first heard, and involved principally questions of fact in respect to stowage.

Roney, for libellant in first case, and for respondent in second.

Flanders, for respondent in first case, and for libellant in second.

CADWALADER, J.

We have here a perishable cargo, with a voyage of extraordinary duration, and weather which, however described by the witnesses, appears by the log to have been at a certain period tempestuous. The preponderating tendency of the proofs is that the cause of the damage suffered was wetting by sea water. The occurrences of the voyage suffice to explain this. The master of the vessel is therefore not liable to the merchant unless by reason of bad stowage.

The question as to stowage is twofold. First, was there proper and sufficient dunnage? On this point, I do not think that the case of the libellant is made out on the law and the facts. Secondly, is the proof of the grounding and shipping of water in the East River sufficient to show that the cargo theretofore taken in was wetted so that it was improper to complete the lading without reference to that occurrence? On this point, if the decision depended on the examination in chief of the steward, the decree should, I think, be for the libellant. But in the steward's cross-examination, he says that he did not see any shipping of water, and the master and the mate testify that no water was taken in. The case of the libellant is one of great hardship, but the libel must be dismissed with costs.

Decree accordingly.

NOTE. For the report of the second of these cases, being the suit for freight, with the opinion of BUTLER, J. see 7 W. N. C. 148.

DISTRICT COURT. DECEMBER 21, 1877.

ADMIRALTY.

THE SCHOONER PATHFINDER.

Priority of liens for wages and supplies.

MOTION for distribution.

On September 3, 1877, Casselberry filed a libel for supplies against the schooner; the Court thereupon issued a writ of attachment which was duly returned "attached" etc. Pending

the writ, another libel was filed for supplies, and two for wages. These were libels of intervention. None of the claims were contested.

Upon September 28, an application having been made for the sale of the vessel, and having been refused, the Proctor for the original libellant then moved for and obtained a decree *pro confesso* and an order of appraisement and sale. A few days afterwards, but before the sale, the intervening libellants obtained decrees in their favor for the amount of their several claims.

The fund in Court was not sufficient to pay all the decrees.

The original libellant claimed the whole fund.

The motion for distribution was three times argued, and at the second argument the Court decided that the wages of the mariners were to be paid first. The question of priority between the decrees for supplies was now argued.

Henry Flanders, for the original libellant.

It is the established rule in England that the superior diligence of the first suitor will be rewarded by payment in full, in such cases.

The Saracen, 6 Moore, P. C. 56.

The Clara, 1 Swabey, 1.

The Gustaf, 6 L. Times R. (N. S.), 660.

Cootes Admiralty, 134-5.

Maclachlan, C. XV.

This doctrine of *prior petens* has been adopted in the United States.

Woodworth *v.* Insurance Co., 5 Wall. 87.

Priority of seizure entitles the libellant to priority in payment.

The Globe, 2 Blatchford, 428.

The Triumph, Id. 433 (Notes).

C. H. Howell (with whom was *J. Warren Coulston*), for the intervening libellant.

The doctrine of *prior petens* is inapplicable. There are no cases in England where all the decrees were obtained before the sale, as in this case, and that makes a material difference.

[CADWALADER, J. I am not willing to adopt the English decisions. They seem to proceed on the doctrine that the Court of Admiralty is not a Court of Equity in regard to the Marshalling of Assets.]

The Desdemona, 1 Swabey, 159, is an English case, where the Court made a ratable distribution between judgments obtained at different dates.

In Woodworth *v.* The Insurance Co. (*Supra*), the first suitor had established the facts on which the recovery of both was based. Here there was no contest.

The libel of intervention was proper and regular, and is entitled to all benefits to be derived from the writs of attachment and sale.

Revised Statutes, § 921.

The Young Mechanic, 3 Ware, 58.

The Tangier, Id. 110.

The R. P. Chase, Id. 294.

[THE COURT. The question is, does the prior seizure entitle the material man to priority in payment? The cases in Blatchford seem to indicate that it does.]

The case of the Globe (*Supra*) merely decides that the lien of the suitor for supplies was divested by the sale of the vessel under process of the State Courts. The lien for supplies was held paramount to that of forfeiture, which depends on seizure, in—

The St. Jago de Cuba, 9 Wheaton, 416.

C. A. V.

CADWALADER, J.

After consideration, I must decide in favor of the original libellant, but with great doubt. The case of The Globe is not applicable, but the decision of JUDGE BETTS in The Triumph is, and is approved by JUDGE NELSON.

The case rests on very narrow grounds. The lien, as it is loosely called, for supplies is a peculiar one, dependent on the justice-seat or *forum* and merely gives the libellant a right of seizure. When he has exercised this right, the Court will not keep the case open for other claims of like nature, which

may come in from all parts of the world, but must award the fund to the first suitor.

Decree accordingly.

CIRCUIT COURT. JANUARY 5, 1878.

EQUITY.

WALKER *v.* KREMER ET AL.

Executed contract. Effect of collateral illegality in conducting the business which was the subject of the contract.

BILL IN EQUITY filed by the assignee of the State Insurance Company of Missouri, a foreign insolvent corporation, against its Pennsylvania general agents, setting forth an account stated by them, and praying that they should be decreed to pay the balance due thereon; or, if they denied the correctness of their account stated, make discovery and account. The answer set up, *inter alia,* the fact that during that period when the corrections were made the company had not complied with the Pennsylvania Statutes requiring a foreign Insurance Company to pay a license fee, etc., to the state. The case was argued in this point only.

A. Sydney Biddle, for the complainant.

The principle is that where the illegal agreement is the total foundation of the suit, the complainant cannot recover, because the Court will not aid him to recover the fruits of a forbidden transaction. But where, as here, the illegal contract has been executed and one of the parties holds the results of that, either in money or other property, he should not be allowed to rip up the original transaction to show that the thing sought to be recovered was the result of a fraud. To put it differently, where the original contract has been executed, so that the complainant merely seeks to recover its results, if the defendant's relation to the property held by him is such as to afford a good consideration of a new promise, express or implied, the complainant may recover. In Lestapies *v.* Ingraham, 5 Barr, 81, this principle was announced in the opinion of Gibson, C. J. And it has been recognized in Fox *v.* Cash, 1 Jones, 211, and in

Evans *v.* Dravo, 12 Harris, 62. A new promise need not be expressly made; it is enough if the illegal contract has been executed, and the result, *i. e.* the funds produced by it, would be a sufficient consideration for a new promise, if it were proved that one had been made. Besides, here we have an instrument in the form of the account stated upon which suit might be brought.

James L. Ferriere, contra.

This case is determined by Thorne *v.* Traveller's Insurance Company, 30 Smith, 15. The policy of the Insurance Acts is clearly stated there. The propositions of the complainant are incorrect deductions from a well known principle. The leading case is Faikney *v.* Reynous, 4 Burrows, 2069. But there the bond in which suit was brought was given by the partner whose share of the illegal losses had been paid by the plaintiff. The consideration was not the contracting, but the paying of the illegal debt. How can the complainant prove his case without showing that he has violated the Statute? And this is the true test.

[McKennan Cir. J. May he not rely upon the account stated, without averring anything more than mutual dealings which will give him a footing here? Does not the principle of the cases show that you are debarred from proving the original contract to be fraudulent?]

The Pennsylvania cases cited are in direct conflict with that of Armstrong *v.* Toler, 11 Wheaton, 267, in which the opinion was delivered by Marshall, C. J. The law is there stated, p. 271, to be that "No action can be maintained on a contract the consideration of which is prohibited by law."

McKennan, Cir. J. The case is a very doubtful one and my opinion has wavered during the argument. The Pennsylvania cases cited by Mr. Biddle certainly seem to establish his proposition, but it may be doubted whether they are not in conflict with the decision of the Supreme Court of the United States in Armstrong *v.* Toler, *Supra.* On the whole, I am inclined, to direct the defendant to account.

CADWALADER, J. I am inclined to agree with Mr. Ferriere's argument, and if he wishes to take the case further, would, as the amount is less than $5,000, certify to a difference of opinion. The principle is extremely important, and it may be questioned whether C. J. GIBSON has not abandoned the rule in his statement of the corollaries to be drawn from it.

C. A. V.

January 8. 1878. The Court entered a decree for an account. CADWALADER, J. saying that, on further consideration, he concurred with MCKENNAN J. as to the defendant's liability to account.

CIRCUIT COURT. JANUARY 14, 1878.

EQUITY.

McCOMB *v.* THE CREDIT MOBILIER OF AMERICA.

To entitle a subscriber to stock to demand shares from the company, where no payment has been made, and a considerable time has elapsed before suit, the complainant must show that the officer of the company had authority to make a contract on an indefinite credit—otherwise no contract exists on which he can claim title.

BILL ANSWER and proofs.

The bill, filed October 26, 1868, set forth that in March, 1866, the complainant McComb agreed with Crane, the treasurer of the Credit Mobilier to take 250 shares of the capital stock of the corporation, and drew for that amount on Faut for whom the shares were taken. Faut declined paying the draft, and taking the stock. McComb then agreed to take up the draft, and Faut transferred his right to the stock to him. McComb tendered $25,000, the agreed price of the shares, in May, 1866, but refused to allow Crane to have the money, unless he would then issue him a certificate. Crane offered a receipt and promised a certificate, on the return of the president, who was then in Omaha. McComb refused to pay on these terms. In June, 1866, the entry of the receipt of the $25,000 for the stock by the draft on Faut was cancelled by a cross entry.

The bill prayed that the stock should be issued to McComb, with all dividends paid in the interval.

There was no evidence that Crane had authority to make any contract for the shares, except upon the terms of the charter, and there was nothing special in those terms. The complainant endeavored to prove that his right was recognized by the Company until February, 1867, and then first denied. The value of the stock had greatly increased in the meantime.

The defendants endeavored to prove that the contract or claim had been abandoned and that McComb's conduct in 1866-7 showed he did not claim the stock, nor pretend to be bound to pay for it.

Under the ruling of the Court, the only material point on the present hearing was, whether an ownership of shares by contract was shown.

J. E. Gowen and Jeremiah S. Black, for complainant.

The contract passed the title. The books showed that the draft on Faut was accepted as payment. While the stock was below par, the complainant was given no reason to suppose his right would be denied, and the remedy of the complainant was to sue on the draft.

McMurtrie, contra. The contract was for cash, the draft being taken as cash. When that was returned unpaid—no shares having been issued—the situation of the parties was precisely that of a seller for cash who receives a cheque on a bank where there are no funds, and the goods have not been delivered. The purchaser cannot keep the seller forever in the position of one who retains goods as security for the price. The act of the company in cancelling the credit by the cross entry in June, 1866, showed they had abandoned the contract. After that the position of McComb was that of any other buyer for cash, where nothing had been paid and no delivery made. No title ever passed. It was merely contractual, and that ended by neglect to pay within a reasonable time.

The Court. [McKennan and Cadwalader, JJ.]

The Credit Mobilier of America, is a corporation established by the laws of the State of Pennsylvania, and its officers, who represented it in the transaction upon which the complainant founds his title to relief, appear to have been authorized to receive subscriptions to its capital stock, and to issue such stock to subscribers on payment of its par value in cash, and they may have had incidental authority to allow a reasonable time for such payment. But they had no power to give an indefinite extension of credit, and the complainant could not by any arrangement of combination with them obtain it.

Dealing with the ministerial officers of a corporation touching a subject over which they had only such control as was clearly conceded to them, it was his duty to inquire into the source and extent of their authority, and he is, therefore, chargeable with knowledge of its limitations, and of the necessary conditions under which they could bind their constituent.

Upon the admitted facts in the case, there was no payment or authorized waiver of payment for the stock for which the complainant seeks to make the defendants accountable. He did not, therefore, acquire any title to the stock.

This view of the case renders it unnecessary to consider whether the complainant's inaction, or imputed acts of disclaimer on his part, or his alleged assent to other dispositions of the stock, may have induced or sanctioned the issue of the stock of the whole capital to other persons, so that it would be against equity to sustain his present contention.

Irrespective of these considerations, the Court is of opinion that he is not entitled to relief, and his bill is therefore,

Dismissed with costs.

CIRCUIT COURT. JANUARY 15, 1878.

EQUITY.

KEMBLE *v.* THE WILMINGTON AND NORTHERN RAILROAD COMPANY.

Injunction. Railroad—Act of April 8th, 1861 (Pennsylvania). Corporation restrained in equity from securing its stockholders the value of their stock by bonds and mortgage, no valid debt existing.

BILL AND ANSWER.

Bill in equity, filed by the complainant, a citizen of the State of New York, on behalf of himself and other stockholders of the corporation defendant, for an injunction to restrain the defendant from executing a certain mortgage to its stockholders.

The bill and answer disclosed the following facts: The property and franchises of the Wilmington and Reading Railroad Company had been sold under a decree of foreclosure of this Court. Pending the proceedings, the first mortgage bondholders, for their mutual protection, entred into an agreement by which they were to deposit the bonds they held, together with fifty cents on each hundred dollars worth of bonds, to be used in purchasing the mortgaged premises. Certain parties were appointed attorneys in fact to buy the property, receive the conveyance in trust, and to distribute a bond or certificate of stock of the new corporation, to be organized upon said purchase, for each bond of the old corporation. The new bonds, thus agreed to be issued to the stockholders of the new corporation, were to be secured by a mortgage of the property of the new corporation. Under the agreement $1,203,100 of bonds were deposited, and $80,000 in cash. The property of the old corporation was bought by the attorneys in fact for $100,000, they taking the deed as individuals. The new corporation, defendant in this suit, was thereupon duly organized under the general Act of Assembly of April 8, 1861 (Corporations), and under a Special Act obtained in Delaware for that purpose, and the new corporations in the two states were then merged and the capital fixed at $1,500.000. Of the $100,000 purchase money, the attorneys in fact received the greater proportion as holders of the bonds of the old corporation which had been deposited. The balance of this sum, after satisfying the valid debts of that corporation, they paid to the defendant, and also executed to the latter a deed of the property in consideration of the agreement entered into among the bondholders, that a mortgage on the franchises and property of the new corpora-

tion should be made to the Fidelity Trust Company as trustees of the bondholders of said corporation.

G. M. Dallas, for complainant.

No motive appears why this mortgage should be given but to cut out future indebtedness; a mere denial of the motive is insufficient. Whatever the power of a corporation to execute a mortgage, it is clearly *ultra vires* when there is no debt and no consideration. The deed to the stockholders and the payment of the dividend on the stock deposited were only an execution of the trust which the court would have enforced, and were in no sense a consideration. Whether the complainant be one of the parties to the agreement or not, he is not estopped from contesting an unlawful act. The question is simply whether an act can be done *ultra vires.* The stockholders are already owners of the stock by the Act of April 8th, 1861, Purd. Dig. 290, and now propose by their own act to duplicate their property.

Commonwealth *v.* Central Passenger Railway Co., 2 Smith, 506.

Mackason's Appeal, 6 Wr. 330.

Lewis Waln Smith, for defendant.

There was a consideration for the mortgage both in the payment of the amount received on the bond deposited, which the original bondholders and the stockholders of the new corporation would otherwise have received, and in the conveyance of the property to the said stockholders. Whatever may be the effect of the Act of Assembly as to creating a corporation, certainly there was no corporation in Delaware until a special act had been passed, and previous to that the attorneys owned the road in Delaware, which they transferred as has been said. Furthermore, the attorneys in fact took the property in trust with certain duties to be performed, and a Court of Equity compels the performance of such duties, and when they transferred the property, the assignee took subject to the terms which bound the assignors. The property is held under a pledge to issue the mortgage. The stock was issued because

the law does not permit mortgages to go beyond the value of the stock issued.

CADWALADER, J.

The Act of April 8th, 1861, under which the corporation defendant was organized, authorizes the issue of bonds to an amount not exceeding the capital, secured by mortgage of the property and franchises. The Act does not authorize the issue of such bonds otherwise than for a new, adequate, valuable consideration increasing the available funds of the corporation. The bonds and mortgage which it is proposed to execute would not have this effect, but would be for a different intended purpose. The injunction prayed for is, therefore decreed.

CIRCUIT COURT. JANUARY 17, 1878.

ADMIRALTY.

THE BARQUE RELIGIONE E LIBERTA.

A clause in a charter, that the vessel shall sail without delay and *in ballast* to enter upon the charter, is sufficiently performed if the vessel carry a cargo of salt, where no damage is shown to have resulted.

Quære, whether, if damage is shown, the charterer is put to a cross action.

APPEAL from the District Court in Admiralty.

The barque was chartered to sail to Philadelphia, and be loaded by the respondents with a cargo of grain for Europe. The charter party contained the following clause:—

"It is understood that the vessel, being already chartered for a previous voyage, has, after completion of the same, to return to Philadelphia, without delay, and *in ballast,* to enter upon this charter."

While discharging at Liverpool, under the first charter, the master made another charter with a third party, whereby the barque which was of the register of 868 tons, was loaded with about 600 tons of salt, which it carried to Philadelphia, and delivered to the consignee, the salt charter stipulating for ——

lay days, and about fifteen days were consumed in discharging the salt.

After the discharge of the salt at this port, the master reported to the respondents, who refused to receive the barque. Freights having declined, this action was thereupon brought to recover the difference.

Numerous witnesses, ship brokers and others, were examined on the question whether salt was considered ballast, the weight of the testimony being that it was not, and that ballast only included an unmerchantable commodity.

The District Court (CADWALADER, J. giving an oral opinion) sustained the libel and entered a decree in favor of the barque, from which decree respondents took this appeal.

Ward and *Henry*, for the appellants (respondents).

The manner of freighting vessels for Europe from the United States requires that the charterer should have the option of loading the moment the vessel arrives, so as to have the advantage of a rise in freight. Hence the stipulation to sail in ballast.

Such a stipulation is a condition precedent.

Lowber *v.* Bangs, 2 Wall. 736.

Glaholen *v.* Hays, 2 M. & Gr. 257.

Crookewit *v.* Fletcher, 1 H. & N. 893.

Ollive *v.* Booker, 1 Exch. 416.

It is not a question whether the master could take salt instead of stone for ballast, although this is more than doubtful under the evidence. A cargo of salt must be entered at the custom house, and be discharged at a proper wharf in proper weather. Hence a cause of detention not occurring to a vessel sailing in ballast. Here the master after chartering to the respondents "to sail in ballast," actually re-chartered at Liverpool for a cargo of salt, giving the privilege of lay days to the charterer. The Philadelphia charterer was therefore at the mercy of the Liverpool charterer who could have detained the vessel after arrival, and the Philadelphia charterer might lose the chance of the market.

It is not a question of damages, but whether we were bound to accept.

Flanders, contra.

Any heavy merchandise in quantity sufficient to trim or stiffen the vessel is ballast.

Abbott on shipping, 4.

Towse *v.* Henderson, 4 Ex. 889.

Even if not so, yet the stipulation to sail in ballast is not a condition precedent, but a mere agreement, a breach of which makes the parties liable in damages, if damage can be shown.

Tarrabochia *v.* Hickie, 1 H. & N. 183.

Dimech *v.* Corbett, 12 Moore P. C. 199.

Davidson *v.* Gwynne, 12 East. 381.

Spee's Abbott, 188.

McAndrew *v.* Chapple, L. R. 1 C. P. 643.

Fothergill *v.* Walton, 8 Taunt. 576.

THE COURT. January 17, 1878. Decree affirmed with costs.

CIRCUIT COURT. MARCH 26, 1878.

NEGOTIABLE INSTRUMENTS.

MACK *v.* BAKER AND OTHERS.

The holder of a promissory note as collateral is not a purchaser for value. The general commercial law of the United States in this particular is not inconsistent with the decisions of the courts of Pennsylvania.

RULE for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note made by the defendants to the order of one Zahn, and by him endorsed to the plaintiff.

The affidavit of defence alleged that the note of suit was given in renewal of a note for which the defendant's firm never received any consideration; that the original note was given to Cummings & Co. to be discounted by them for the benefit of the defendant's firm; but that Cummings & Co. never had the same discounted, but passed it over to Zahn, to

secure the payment of an antecedent debt due him by Cummings & Co.

H. Goodwin, for the rule.

The defence that the note was given to the plaintiff as collateral only, although established perhaps, in the States of Pennsylvania and New York, Coddington *v.* Bay, 20 Johnson, 637, has been declared invalid by the Supreme Court of the United States in—

Swift *v.* Tyson, 16 Peters, 15. See also

Byles on Bills, * 124, * 229-232.

The renewal of a note implies a forebearance which is a sufficient consideration.

Tull, contra, cited—

Cummings *v.* Boyd, 4 Weekly Notes, 66*.

Royer *v.* The Keystone Bank, Id. 86.

CADWALADER, J.

After consideration I do not doubt the correctness of the decision of the Supreme Court of Pennsylvania in Royer *v.* The Bank, *Supra.* There is an extrajudicial remark of Judge Story in Swift *v.* Tyson, 16 Peters, 15, in which he holds that the taking of a note simply as collateral security is a sufficient consideration, and gives the purchaser a better title, than the endorser had. But this is no part of the decision, which is that, where the note is taken in payment the consideration is sufficient.

Where time or indulgence is given, or something is done to change the relations of the parties to the original consideration, the case is different; but here the defence is sufficient, according to Royer *v.* The Bank, *Supra.*

The doubt I had of the case was as to the renewal of the note; whether that was not equivalent to giving time. It is so generally, unless the ordinary effect is negatived by peculiar circumstances. Here the time given was on the collateral, and not on the original debt, and hence could not suspend the right of action, as has been often decided.

Rule discharged.

CIRCUIT COURT. APRIL 22, 1878.

PRACTICE.

EX-PARTE SCHOLLENBERGER.

Jurisdiction of the Circuit Court in the case of a foreign corporation defendant which had been served according to the provisions of an Act of Assembly of the State of Pennsylvania, but had not appeared to the writ.

RETURN to an order on the Judges of the Circuit Court to show cause why a writ of mandamus should not issue, etc. The order was made in the petition of William Schollenberger and William Schollenberger, Senior.

The facts will appear from the Return and from the following statement, taken from the report of the case in 6 Otto, 369.

"Schollenberger, a citizen of Pennsylvania, brought sundry suits in said Circuit Court against certain foreign insurance companies, upon policies which they had severally issued upon his property situate in that state and within the jurisdiction of the Court.

"Each company, before the issue of its policy, had accepted the provisions of the statute of the State, and, in compliance therewith, appointed its agent residing there, on whom process of law against it could be served. So much of the Statute as bears on the question here involved is set out in the opinion of this Court.

"The service of the writs, which were sued out by Schollenberger, and executed in accordance with the State Law, on the agents of the several companies by them respectively specified for the purpose, and residing within the jurisdiction of the Court, was quashed by the Circuit Court. On his petition setting forth the foregoing facts, a rule was awarded upon the judges of that Court to show cause why a writ of *mandamus* should not be issued out of the office of this Court, commanding them to hear and determine the suits so brought in the said Circuit Court, and also to strike from the record certain orders dated the thirteenth day of April, 1878. Whereby the service of the said writs were quashed, and thereupon to make

such disposition of the suits as ought to have been made, had the said orders not been entered."

The report does not contain the Judge's return to the order to show cause verbatim, or the "Note" annexed thereto containing the reasoning on which the rule to quash was made absolute. They are now given.

It may be added that in accordance with the decision of the Supreme Court, the Circuit Court rescinded the order quashing the writs, and the cases proceeded to trial. See Schollenberger *v.* The Phœnix Ins. Co. of Brooklyn, post.

The "Note" referred to was by CADWALADER, J.

THE RETURN is as follows:

WHEREAS, It was on the 15th day of April, 1878, ordered by the said Supreme Court that the Judges of the said Circuit Court, on the 22d day of the same month, or as soon, etc., show cause why a writ of Mandamus should not issue, commanding them to hear and determine the suits mentioned in the petition of William Schollenberger and William Schollenberger, Senior, in which such an order was prayed, and to strike from the record of the said suits the orders quashing the service of the writs therein mentioned.

Now the Judges of the said Circuit Court, in return to the said order, submitting to the Supreme Court the question whether the case is a proper one for the remedy by writ of Mandamus, answer as follows:

The facts in the said petition alleged are truly stated therein.

The respondents have declined to hear and determine the said suits, because, in their opinion, the said Circuit Court has no competent jurisdiction thereof, the several and respective defendants not having appeared therein, or, in any wise, submitted to the jurisdiction of the Court, and not having been at the commencement of the respective suits or at any time, *inhabitants of, or found in,* the said district, within the meaning of the Act of Congress of March 3, 1875, re-enacting a like provision of the 11th section of the act of September 24, 1789.

The question under this enactment being one of jurisdiction, and not of mere procedure, the legislation of Pennsylvania,

mentioned in the said petition, was, in the opinion of the respondents, inapplicable. The service of the process in the said suits was therefore set aside, as unauthorized.

The reasons of the respondents are, in some respects, more fully stated in a note hereto appended.

Respectfully submitted.

WM. MCKENNAN,
JOHN CADWALADER.

NOTE.

Normally, the seat of justice, when proceedings are *in invitum,* is the home of the defendant, or the place he may be served personally with process. *Actio sequitur reum.* The exercise of original compulsory jurisdiction elsewhere, by local arrest of his property, or by what is called *substituted service* on his local agent, is, when allowed, an exceptional privilege of the creditor. But such a privilege may reasonably be allowed, in certain cases, in the exercise of internal jurisdiction, by the ordinary tribunals of a nation or State. Thus the process of foreign attachment, limited to the property of non-residents which is actually within the territorial limits of the State or country, is not generally considered objectionable.

It seems, that in England, the process in a suit against a foreign corporation upon its contract made by its general local agent, may now be served on such agent. Laws of several of the States of our Union, including the Act of Pennsylvania mentioned in the petition, authorize foreign corporations of certain kinds to transact business within the respective States on the condition of maintaining a local agency in such manner that process against the corporation may be served on the agent. The Supreme Court of the United States has considered such a condition reasonable and proper (The Lafayette Insurance Company *v.* French, 18 Howard, 404). On the same principle, Congress, in legislating as to judicial proceedings in the District of Columbia, enacted in 1867, that in actions against foreign corporations doing business in that district, all process may be so served (14 Ll. U. S. 404). This is one

of the acts of Congress which are called by the Supreme Court of the United States "local to the district" (Railroad Company *v.* Harris, 12 Wallace, 65, on p. 86). They do not constitute any part of what may properly be called the judicial system of the United States.

Considerations, in many respects different, apply to questions of original jurisdiction, under the judicial system of the United States. As the system has been organized, original jurisdiction is apportioned according to a territorial division into districts, not one of which is composed of two States, or of parts of any two States. But the purposes of this territorial division do not require that as extended a system of internal jurisprudence, in all respects, shall be organized under the Federal government within the limits of each State, as may exist under laws of the State.

Where the Federal jurisdiction is exercisable, Acts of Congress indeed adopt, for the Federal courts, the forms and modes of procedure in use in the several States. But these acts do not enlarge or define the original jurisdiction of the Federal courts, or assimilate it to that of the State courts. The acts merely regulate the exercise of jurisdiction where it is already competent, as originally defined.

In a case in which it was decided that the State legislation could not limit or restrain the exercise of the judicial power of the United States under authority given by Congress, the Supreme Court stated also conversely the proposition that "*State legislation cannot confer jurisdiction upon the Federal Courts*" (Insurance Company *v.* Morse, 20 Wallace, 453).

The present question is wholly one of original jurisdiction. In organizing the judicial system under this head, Congress has thought it necessary to exclude expressly any sanction, which might otherwise be implied, of laws or usages of England, or of any State of the Union, enabling a plaintiff to transfer jurisdiction from the normal seat of justice to any other place where a defendant's property, or a defendant's agent, might happen to be. This was the purpose of the provision of the 11th section of the Act of 1789, that no civil

suit should be brought against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

In the absence of such a precautionary express exclusion, it might have been material to inquire whether the Acts of Congress which adopt the laws of the several States, and the practice of the State Courts, would apply to a case like the present, so as to sustain the jurisdiction. What was said in Picquet *v.* Swan, 5 Mason, 35, 42, 43, and in Toland *v.* Sprague, 12 Peters, 300, 328, would then have required careful consideration. These cases and Richmond *v.* Dreyfous, 1 Sumner, 131, apply to foreign attachments. There are authorities more directly in point, which render the inquiry unnecessary.

In the Bank of Augusta *v.* Earle, 13 Peters, 588, and in other cases, it is established that a corporation, although it may have power to make contracts and incur obligations in a foreign State, can have no legal existence out of the boundaries of the sovereignty by which it is created. "It must dwell in the place of its creation, and cannot migrate to another sovereignty." Therefore a corporation created by one of the States of our Union cannot be an *inhabitant* of another State in which it transacts business though under an established and recognizable agency.

Day *v.* The Newark India Rubber Manufacturing Company, 1 Blatchford, 628, 631, 632, 633, 634, was the case of a foreign attachment against a corporation of another State. Nelson, J., said that "in order to give jurisdiction to the Circuit Courts, the party defendant must be an inhabitant of the district in which the suit is brought, or he must be found within it at the time of the service of the original process; and this whether the suit be commenced by writ, summons or attachment, or whatever may be the nature or character of the process used." Nelson, J., said further, that according to the true construction of the 11th section of the Act of 1789, the Court would have no jurisdiction in suits instituted against foreign corporations, even in cases where the State practice, if adopted, would authorize

the institution of such suits by the attachment of their goods, found within the jurisdiction.

Pomeroy *v.* The N. Y. and N. H. R. Co. (4 Blatchford, 121), cannot be distinguished from the present case. A law of New York, which gave certain privileges to a Connecticut corporation transacting business in New York, declared the corporation suable in the same manner as corporations created by the laws of New York, and that the process might be served on an officer or agent of the corporation. The corporation availed itself of the privileges, and submitted to the conditions. There was no doubt that it was suable in the Courts of the State of New York. But it was decided that the Circuit Court of the United States, for the Southern district of New York, had no jurisdiction of a suit against the corporation in which the process had been served in the manner thus authorized by the Act.

There was a decision of like effect in the Southern Atlantic Telegraph Company *v.* The New Orleans, Mobile and Texas R. Co. in the Circuit Court of the United States, for the Southern district of Mississippi (2 Central L. J. 88).

The re-enactment of the provision in question, in the same words, by the Act of 1875, is not unimportant, because the decisions which have been cited had rendered the question familiar.

It was a subject for the practical application of the rule that the construction of a statute forms a part of the statute. If there was any doubt of the correctness of the past interpretation, the form of the re-enactment would have been changed.

This observation was made, since the re-enactment, by Judge Dillon, in a case decided by him in the same manner (Stillwell *v.* The Empire Fire Ins. Co., 4 Central L. J. 463). The strong leaning of that Judge's mind was in a contrary direction, but he said that his decision was according to the view of the law generally accepted and acted upon, and that this was the third case, in seven years, in which it had been attempted in his circuit, by the service of an original process on the agents of foreign corporations, to acquire jurisdiction over the corporations themselves.

In a note to the last-mentioned case (Ib. 464), the reporter cites a similar opinion of the Circuit Court for the Western District of Missouri, in Dollinger *v.* The Farmers', Merchants' and Manufacturers' Fire Ins. Co. The same point had been similarly decided by this Court in an unreported case; and other cases to the same effect are noted in the briefs of counsel.

The only decision to the contrary, which has been mentioned, is that of Knott *v.* The Southern Life Ins. Co., 2 Woods, 479. The case appears to have been ruled upon a misconception of the decision in The Railroad Company *v.* Harris, 12 Wallace, 65, already cited. By "An Act concerning the District of Columbia," passed on February 27, 1801, § 6, it was provided that no action should be brought before the Circuit Court of that district by any original process, against any person who should not be an inhabitant of, or found within, said district at the time of serving the writ (2 Ll. U. S. 106). This local enactment was in the same words as the provision of the 11th Section of the General Judiciary Act of 1789, which is now in question. So far as the local enactment could, in any wise, have been material to any present question, the provision was repealed by the local enactment of 1867 already cited. This enactment was that in action against foreign corporations doing business in the District of Columbia, all process may be served on the agent of such corporation, or person conducting its business aforesaid, or, in case he is absent and cannot be found, by leaving a copy thereof at the principal place of business in the district; and such service shall be effectual to bring the corporation before the Court (14 Ll. U. S. 404). That this was a repeal *pro tanto* there can be no doubt. But repeal *pro tanto* of what? Not of the provision of the 11th Section of the General Judiciary Act of 1789, which never was applicable to the District of Columbia at all, but of the similar provision of the local act of 1801. The Supreme Court said expressly that the jurisdiction of the Court below was not governed by the 11th Section of the Judiciary Act of 1789, but by acts of Congress local to the district.

This case in 12 Wallace, therefore, on which the present

plaintiff chiefly relied, does not in any wise concern the present question favorably to his contention. But the opinion of the Court refers to the case of the Bank of Augusta *v.* Earle, in a manner unfavorable to the contention as we understand the subject.

CIRCUIT COURT. APRIL 23, 1878.

EQUITY.

NATIONAL STATE BANK OF CAMDEN *v.* PIERCE.

A national bank located in one state has an office in another state for the purpose of receiving deposits to be transmitted to the bank: *Held*, that it does not become thereby located in the second state and liable to taxation by it.

BILL and ANSWER.

The bill set forth that the complainant was a national bank engaged in business in New Jersey; that for the convenience of persons in Philadelphia desiring to deposit money therein, it kept a clerk in an office in that city, to receive deposits and deliver them to the bank in Camden at the close of each day; that the defendants who were the bank assessors of the State of Pennsylvania, had served on the complainant a notice of an assessment of a tax upon the entire capital stock of the bank; that said assessment which was made under the Acts of the Assembly of Pennsylvania of April 12, 1867, April 2, 1868, and December 22, 1869, was contrary to law and void; that the complainant had taken an appeal from the assessment in due time, but the assessors refused to vacate or alter the assessment. An injunction was prayed restraining the assessors from returning the assessment to the Auditor General of Pennsylvania, and a decree that the assessment was illegal and contrary to law. The answer admitted the facts of the bill, so far as within the defendant's knowledge, but claimed that the tax was properly assessed.

John Goforth (with him *C. S. Carson*) for the complainant was not called upon.

S. G. Thompson, contra. The simple question is, is this a bank located in Pennsylvania? A bank may be either of discount or deposit. If it performs the function of either in a place, it becomes located there. If it do business in two places, it must be taxed in both.

[CADWALADER, J. It is a criminal offence to carry on banking business in the way suggested in Pennsylvania without a license obtained in a particular manner, but that does not make the offender a bank located in Pennsylvania.]

This is not an assessment upon a stockholder, as such, but upon the bank.

MCKENNAN, J. (CADWALADER, J., concurring). We have decided, after full discussion, that even when a corporation carries on business in a State, it does not thereby become an inhabitant of it, and we cannot go further and say that by similar conduct a corporation becomes located therein.

Injunction granted.

CIRCUIT COURT. APRIL 27, 1878.

EQUITY.

THE UNION MUTUAL LIFE INSURANCE COMPANY *v.* KELLOGG.

1. The corporation complainant filed a bill in equity, to determine, *inter alia,* the ownership of, and recover, a fund held by its agent, the defendant, and which came into the latter's hands as the complainant's money. After answer filed, the complainant moved for a receiver of the fund: *Held,* that without deciding the merits of the controversy, a receiver might be appointed before the evidence was closed, if the pleadings, coupled with defendant's admissions showed: (1) The reception by defendant, as agent, of a fund *prima facie* belonging to complainant; (2) Probable peril to the fund, if left in the defendant's hands pending litigation; and (3) A presumption that the fund was actually existing under the defendant's control when the bill was filed. And this latter presumption will arise from a statement or admission by the defendant that he has not embezzled any portion of it, and that he can satisfy a decree for the amount, if against him.

2. The bill prayed an account of moneys received by the defendant for the company, and for a receiver to hold the fund *pendente lite.* The answer admitted the receipt of the money, but averred a set-off for prospective

salary and commissions, which the defendant alleged he had been prevented from earning by the complainant having illegally terminated his contract of agency; also other smaller items of set-off. The pleadings showed that even were the smaller items admitted, but the first disallowed, there would be a balance due the complainant. The evidence, as far as taken, showed probable peril to the fund if left in defendant's hands: *Held*, that after answer filed, but before the evidence was closed, a receiver should be appointed for such balance, without deciding the merits of the controversy, but— *Quære*, whether, in equity, such prospective earnings could in such a case be the subject of a set-off against the company by its agent.

BILL IN EQUITY, filed in March, 1877, by the Union Mutual Life Insurance Co. against the defendant, its general agent for the States of Pennsylvania and Maryland, averring that by the terms of a written contract annexed to the bill, the company had a right to discharge the defendant upon thirty days' notice, which right it had duly exercised; that the defendant had received as the company's agent large sums of money for premiums, of which there remained a balance due to the company, after all deductions to which the defendant was entitled, of over $15,000. The bill also averred that the defendant had refused to account; that there was danger of his removing from the jurisdiction of the Court, and of his taking with him all his property, and that there was imminent danger of a waste of the complainant's money, if left in the defendant's hands.

The bill prayed for a writ of *ne exeat*, a receiver, an injunction forbidding the defendant to dispose of any of the company's moneys, and an account.

On the day that the bill was filed, after hearing counsel for the defendant, and writs of injunction and *ne exeat* as prayed for were issued, the amount of the bond in the writ of *no exeat* being in the sum alleged in the bill to be due the complainant. A short order to plead answer or demur in eight days was at the same time granted.

An answer was subsequently filed, in which the defendant stated an account between himself and the company, in which he credited the latter with the amount of money claimed in the bill, and debited it with various disbursements, alleged to have been duly made by him for the company, together with certain

claims by him against the company, resulting in a balance in the defendant's favor of $1,500.

The answer also alleged that the contract of agency was, by its terms, to last till December 1, 1878; that it had been wrongfully and unlawfully terminated by the complainant in January, 1877; that by the contract the defendant was entitled to salary and commissions from the actual termination of the agency to the end of the term of service contracted for (Jan. 1877, to Dec. 1878); and two items of $7,000 and $5,500 were, *inter alia,* claimed by way of set-off for such prospective salary and commissions.

A replication having been filed, a master was appointed to state an account, and much testimony was taken, the effect of which, however, was unimportant in the view the Court took of the case, except that coupled with the pleadings it showed the complainant's money to be in peril if left in the defendant's hands.

Before the testimony was closed, the complainant's counsel moved for a receiver.

S. B. Huey and *G. W. Biddle (A. Sydney Biddle* and *Daniel Magoon* with them), for the motion argued that a motion for a receiver was like a motion for an injunction, which could be made interlocutorily. It rests in the sound discretion of the Court, and will be made where it appears *prima facie* that the defendant had money in his hands belonging to the complainant, and that the fund was in peril, provided it could be shown by a fair presumption that the fund was in existence when the application was made.

[CADWALADER, J. If you can show money in the defendant's hands—not money theoretically in his hands, not money he has embezzled—but money actually in his hands, we shall be desirous to act interlocutorily. We can do that.]

This is shown by the bill and answer. The defendant admits having received our money, which, to the extent of $12,500, he is not entitled to set off, or, at any rate, if he is, the fund has been shown to be in peril.

[CADWALADER, J. What is the inference from that? Is it not that he corruptly held it and used it? How does that put the money in his hands, so that we can order him to pay it before final decree, or put him in jail for not doing it? Is the inference from these facts that he still has it, or that he has improperly used it? In Askew *v.* Odenheimer * (not reported), a case in which I was counsel, the defendant in his answer denied having anything of the complainant's. On the mere question of arithmetic it was found that he had several thousand dollars, upon the admitted facts, and even in that case we could not get the money paid into Court until the answer was filed; but upon the answer it was a question of partnership,—he did not divide by 2 when he ought to have done so, and the consequence was, that five thousand dollars was ordered to be paid into Court. That was, however, done with great caution, and because these facts appeared in the answer. As Judge McKENNAN suggested to me just now, you appear to be applying for execution before judgment.]

We do not want this money ourselves, we merely want it paid into Court. All the facts on which we rely appear in the bill and answer, and therefore the principle in Askew *v.* Odenheimer was precisely the same as here.

[CADWALADER, J. Precisely, but the facts were the reverse; a partner had cheated his co-partner, and had made an assignment to the co-partner for his indemnity; the co-partner who had been cheated put his foot on the neck of the co-partner who had cheated him and would not account. The man who had cheated him filed a bill in this Court, and the defendant stated in his answer that so much was required to indemnify him. He did not observe that half of that belonged to the partner, and upon the simple arithmetic he was ordered to pay so much into Court, by his own admission upon his own answer that he had so much money of the complainant's in his hands. The receiver will not be appointed until the final decree, unless it appear by the answer that the defendant still holds the fund.

*U. S. C. C. for E. D. of Penna., 1845.

I agree to everything you say, if you can show that there is a *fund* as contradistinguished from a *debt.*]

The case is identical with Askew *v.* Odenheimer; here the defendant in his answer expressly charges himself with a large amount of money received for the company as its agent. He sets up counter claims, which will exhaust that fund, and leave a balance in his favor of $1,500. Two of the items of set-off are for matters which he cannot claim to set-off in equity at all. Therefore after deducting from the total of those items the excess of $1,500 he has acknowledged, unless it is fair to infer embezzlement, a fund to that extent (viz., $11,000), of the company's money in his hands. The case of Dillon *v.* The Connecticut Life Ins. Co., Court of Appeals of Maryland, 1875, was this identical case. The items of set-off claimed there were the same as here, and the Court appointed a receiver, and this was affirmed in the judgment of the Court of Appeals.

[CADWALADER, J. Was the receiver appointed there before final decree?]

Yes, before the testimony was closed, just as here, upon bill and answer. It is not fair to infer that the defendant has committed a fraud and embezzled the money.

[MCKENNAN, J. I understand you to say that by the necessary import of this account in the answer, the defendant admits that he has $12,500 in his hands, and that he says that he is entitled to retain it, because he has these two claims amounting to that sum against the company. I think that is a fair inference from the document. There are two alternatives. In the first place, the defendant admits that he himself received the money and has it in his hands, but claims to retain it because he says he has certain credits which ought to be allowed him; or else he must say that he is justly subject to the reproach of having criminally embezzled the complainant's money, so that I do not think that we ought to seek to get rid of his admission. If we have, by the documents furnished by the defendant himself—by his own answer—distinct admission that he had a certain amount in his hands when the bill was filed, I think we ought to lay our hands upon it. I do not think that there

is any question, even of arithmetic, here as to the indisputable consequences of the admissions in the answer.]

Upon the 25th of April the counsel of the defendant presented the latter's affidavit stating that he had not concealed the $12,500 or any part of it, or embezzled it, or wasted it, or put it out of the way in any sense, to prevent the complainant from recovering it, if he could establish his right to recover it; that the defendant was entitled to this money, or if otherwise that he had acted in perfect good faith, that he was not insolvent, that he had means out of which the full amount claimed by the complainant, if a decree were finally made against him for that amount, could be paid.

[McKennan, J. I think the affidavit which has just been read, comes pretty close to admitting that the defendant has this money in his hands, and he denies any improper use of it.]

Shick and *B. H. Brewster,* contra, argued that there was no admission in the answer, or by the affidavit, that any of the complainant's money was in the defendant's hands. On the contrary, by the answer, a balance of $1,500 was shown to be due to the defendant. He had a perfect right to retain that $12,500 to liquidate the damages which he had sustained by his having been wrongfully removed from the agency by the company. Much of this money had been received years before. The affidavit was in no sense an admission that he still had any of the company's money, but a mere denial of the improper use of whatever small balance, if any, was due the company, and which he still had.

The decision of McTighe *v.* Dean (22 New Jersey Equity Reports, 81) was substantially identical with this case. There the receivership was refused. The state of the accounts cannot possibly be determined until final hearing. The evidence is not all in, there is nothing to show that there is any specific fund in the defendant's hands.

[McKennan, J. The defendant's affidavit gets us over a matter of some difficulty, that both Judge Cadwalader and I had yesterday, that is whether the defendant might not have

used this money. He denies that. The money that he got, belonging to the complainant, he says he has still in his hands.]

We do not deny that there was money of the company which came into our hands, but we claim that we have a right to hold that to meet the damages which we have suffered by their unlawful violation of their contract; but we do deny that there is any admission in the papers as to the amount we hold. This proceeding departs from all the precedents in this, that here you pick out two items from the voluminous account which no one but an expert can unravel, and hold that they admit that amount of the complainant's money to be in the defendant's hands.

[CADWALADER, J. I have no doubt it is a great novelty at this stage of the case, and a very important—I do not say dangerous—novelty. There was, however, another case in the Court of Common Pleas (not reported) exactly identical with that of Askew *v.* Odenheimer.]

We have a right to retain enough of the defendant's money to reimburse us for his wrongful conduct in terminating the agency.

Kirk *v.* Hartman, 13 Sm. 97.

Yelland's Case, L. R., 4 Equity, 350.

Ex parte Clark, L. R., 7 Equity, 551.

Ex parte Logan, L. R., 9 Equity, 149.

Thomas *v.* Howell, L. R., 18 Equity, 203.

East Angleon Railway *v.* Lythgoe, 10 Common Bench Rep. 734.

By the English statute unliquidated damages cannot be set off, but in this State unliquidated damages may be.

Eo die. THE COURT (MCKENNAN, J.). We make the order asked for. The only difficulty that I have had about it, so far as my own views are concerned, was of a two-fold character: first, whether there was an admission in the answer, in the exhibits, and in the depositions of the defendant, of any fixed determinate sum in his hands at the filing of the bill, which was received by him by virtue of his relations with the company as its agent, in the course of the business which he undertook

to discharge. That difficulty was removed by the averments in the account contained in the answer, showing an admission by him of the receipt of a certain sum. He claimed to reduce that liability by two items showing that that amount—the aggregate of those two items—had not been expended. The next difficulty was as to whether this money was in such a state that it could be traced and substantially identified, in other words, whether it had been made away with by this man, and was therefore gone as a distinctive fund. That difficulty again was removed by the affidavit of the man himself. As I understand it he distinctly disclaims having had any improper use of this money so that it must be in his own hands, and can be traced there. The fact that this money was received by him as the property of the complainant, and belonging to the complainant here is unquestionable. The answer shows that. Now that he should be permitted to retain that money as security for a claim which he sets up against the company, I cannot see should be any more readily conceded than that the money should be placed in some safe place where it can be available to be paid wherever, in the ultimate result of this litigation, it should be awarded. So that without intending to establish any precedent, except so far as future cases may accord in their features and circumstances with this case, I think that, under the circumstances of this case, we ought to make the order.

CADWALADER, J. I have no doubt that the order will meet the real justice of this case. I should have been satisfied with an order either way, either allowing or refusing the application, but upon the general reasons of the administration of justice, I should have been better satisfied, though I do not intend to dissent from the order made, with suspending this order until the final hearing. The precedent will be a dangerous and an embarrassing one. Still it does meet the justice of the case, and as the application was finally put entirely upon the pleadings, upon the bill and answer, without the affidavits or depositions that were originally exhibited, it is sufficiently within the precedent of Askew *v.* Odenheimer and the Maryland case which seems to be the only other authority, for me

not to dissent from an order which I think meets the justice of the case.

(Oral opinions.)

The following order was then directed by the Court to be entered.

And now, April 27, 1878, upon motion of complainant's counsel, and after argument by counsel, it is ordered that the sum of $11,000 be paid into the registry of the Court on or before the 28th day of May, 1878, by the defendant, Edward Kellogg, to abide the final decree of the Court in this cause.

[NOTE. The sum of $11,000 ordered to be paid into court was obtained by deducting $1,500 (the balance the defendant alleged to be due him by the company on an account stated) from the aggregate of the two items of $7,000 and $5,500 claimed for prospective salary and commissions.]

CIRCUIT COURT. MAY 2, 1878.

INSURANCE.

SCHOLLENBERGER *v.* THE PHŒNIX INSURANCE COMPANY OF BROOKLYN.

1. A clause in a fire insurance policy that the amount of the loss shall on request be ascertained by arbitrators, but that all other defences shall be reserved, coupled with an agreement that no suit shall be brought until after award made, is not a bar to a suit on the policy for the loss, even though an arbitration is pending.

2. There is a distinction between a covenant to pay such a sum as an arbitrator shall award, and a covenant to refer the amount of liability to arbitration. Though a reference as to amount is still pending, a cause of action in the latter case may be enforced in a court of law.

MOTIONS for judgment *non obstante veredicto,* on point reserved, and for new trial.

DEBT on a policy of fire insurance.

The contract was made between the plaintiffs and the company, acting by their local agents in Philadelphia, covering property in Philadelphia. After the service of the writ upon the local agents a general appearance of the company's counsel was entered, and subsequently leave was asked by the defendants to withdraw their counsel's appearance. A rule was also

taken to quash the service of the writ on the ground that original process could not issue (under the Judiciary Act of 3d March, 1875, U. S. Stat. at Large, 1874-5, p. 470) against a foreign corporation, under the proviso in the Act providing that no cause shall be brought before the said Court unless the defendant be an inhabitant of or found within the district at the time of the service of the writ. Service of process in a number of similar cases where no general appearance had been entered, was quashed on the above ground, but in this case the Court held that as the defendants had entered a general appearance, they had thereby submitted themselves to the jurisdiction of the Court, and ordered a special venire for the trial of the case.

A plea in abatement was thereupon filed, to the effect that the plaintiffs could not recover in this action inasmuch as the policy contained conditions precedent not yet performed. The material language of the policy was as follows:—

In consideration of . . . dollars to them paid by the insured, hereinafter named, the Phœnix Insurance Company of Brooklyn do insure [the plaintiffs] against loss or damage by fire to the amount of $2,500 [on certain specified property], and the said Phœnix Insurance Company hereby agrees to make good unto the said insured . . . . all such loss or damage . . . . as shall happen by fire to the property so specified . . . . the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after the proofs of the same, required by the company, shall be made by the insured, and received at the office in New York, and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy . . . .

(9) In case differences shall arise touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liabilities of the company under this policy; and further, that it shall be optional with the company to repair, etc. . . . .

(12) It is further hereby expressly provided and mutually agreed, that no suit or action against this company for the recovery of any claims by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced in twelve months next after the loss shall occur, and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed

as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

This plea in abatement was formally insufficient, not having been sworn to, and the plaintiff's counsel signed judgment against the defendants on the said plea. The cause was ordered for trial, the defendants pleading issuably; and the plaintiffs having made out a *prima facie* case, the defendants asked for a nonsuit on the ground of variance, the declaration having omitted to state the conditions of the policy hereinbefore cited, arguing that it was a condition precedent to recovery that a reference should be had, and an award made, fixing the amount of the claim. The nonsuit was refused.

The defendants then offered evidence to show that an agreement of reference (but not upon the written request of either party) had been entered into between the parties prior to the beginning of this suit, in which it was agreed that all matters in dispute connected with the *amount of the loss* should be referred to the arbitration of two arbitrators therein named, with power to them to choose a third in case of difference, and that the award of said arbitrators, or a majority of them, should be final, binding, and conclusive upon both parties, as to the value of the property destroyed, but should not decide the liability of the company on the risk. They also showed that an arbitration had been begun, and much testimony taken under the above agreement, and that it was still pending at the time that this action was brought, at which time no award had been made and the case had not been concluded before the arbitrators. The defendants offered no further evidence, whereupon CADWALADER, J., who tried the case, reserving the point whether or not the plaintiffs could recover without showing an award, or that said award had been prevented by the defendant's default, left the case to the jury.

A verdict was rendered for the plaintiffs for the full amount claimed, whereupon the defendants entered this motion for a new trial, and to enter judgment in defendants' favor upon the point reserved.

James H. Heverin and *R. P. White,* for the motions.

The condition of the policy requiring an award was a condition precedent, upon compliance with which only the defendants became liable. As admittedly no award had been made, the judgment must be entered for the defendants.

Scott *v.* Avery, 5 House of Lords, 811.

Milner *v.* Fields, 5 Exchequer Reports, 829.

Leebrick *v.* Lyter, 3 W. & S. 365.

Herdic *v.* Bilger, 11 Wright, 60.

Quigley *v.* De Haas, 1 Norris, 274.

L. L. & G. Insurance Co, *v.* Craighton, 51 Georgia, 95.

The contract here is not to pay the value of the property, with a collateral covenant to submit, but to pay what shall be determined by a specific tribunal to be due the plaintiffs. It is similar to the case of the United States *v.* Robertson (9 Peters, 326). The exact point has been decided in Yeomans *v.* Insurance Company (5 Insurance Law Journal, 858), by NIXON, J., of the U. S. Circuit Court of New Jersey. The fact that judgment on the plea in abatement was entered against the defendant for an informality in the plea, is not decisive of the case, inasmuch as the point can be raised on motion for a nonsuit on the ground of variance between the contract alleged and that proved.

The reference to the arbitrators was irrevocable.

Monongahela Company *v.* Fenlon, 4 W. & S. 205.

McGeehan *v.* Duffield, 5 Barr, 499.

Paist *v.* Caldwell, 25 Smith, 161.

Abbott *v.* Sheperd, 4 Phila. 90.

Flaherty *v.* German, 1 WEEKLY NOTES, 352.

A. S. Biddle and *R. C. McMurtrie,* contra.

The condition in this case to refer to arbitrators is not a condition precedent, but a collateral covenant, for breach of which the plaintiff may, possibly, be sued by the defendant in a cross action, but which cannot prevent an action by him in a Court of Law. The rule is that an agreement to oust the jurisdiction of the Court is void, as against public policy. No per-

son is allowed to bind himself by a stipulation which may injure not only himself but the public. See the remarks of Lord Chancellor CRANWORTH on Scott *v.* Avery (*Supra*). See also as to the absurdity of refusing to entertain jurisdiction because of a pending arbitration, which may end in nothing, Scott *v.* Liverpool (3 De G. & J. 368). It is perfectly true that where the liability only arises in respect to a sum stated by a third person, no recourse can be had to the Court before his finding of the amount, unless such finding be excused. But that is not the case here. The agreement is to insure against loss by fire in a certain amount, in consideration of which both parties agree, upon the written request of the other, to submit the amount to arbitration in case of difference. The requirement that the submission is to be made *in case of difference;* and *upon a written request,* shows conclusively that the reference and award are not conditions precedent in every case. Here there has been no written request. The case of Yeomans *v.* The Insurance Company (*Supra*) is opposed to all the authority. The point in this case has been decided by the case of Horton *v.* Sager (4 Hurl. and Norm. 643), and Mentz *v.* The Armenia Insurance Co. (29 Smith, 478). There it was held by the Supreme Court of Pennsylvania that such a condition was void, and the judgment of the lower Court granting a nonsuit was reversed. That case was decided before this contract was entered into, and hence formed one of the terms of the contract which was made in Pennsylvania.

[CADWALADER, J. Perhaps the only remedy which the defendants could have would be to ask in a Court of Equity that execution should be restrained until a reasonable time had elapsed in order to enable the arbitrators to make an award.]

White, in reply.

The contract is not to be governed by the Pennsylvania decision, which is opposed to the authorities. This Court will not be bound by State decisions on questions of general law.

S. & A. Tel. Co. *v.* N. O. M. & T. R. R. Co., 2 Central Law Journal, 88-89.

Sanford *v.* Portsmouth, Central Law Journal, February 22, 1878.

This case differs from Mentz *v.* The Armenia Co. (*Supra*), inasmuch as here the parties entered into the arbitration expressly excluding, by the terms of the agreement, all questions except that of amount. The written agreement of reference is equivalent to a waiver of requirement for the written request.

[CADWALADER, J., having asked the plaintiffs' counsel whether they would object to an allowance of a moderate amount of time, to enable the arbitrators, if possible, to make an award, with the understanding that the verdict should be reduced to their award, if below the verdict, otherwise to stand as found by the jury, counsel answered that such an agreement would be perfectly satisfactory.]

THE COURT. (CADWALADER, J.) We have no hesitation in saying that the conditions to refer, and that no suit shall be brought until award made, do not suspend the plaintiff's right of action. This has been decided in the case of Mentz *v.* The Armenia Insurance Co. (*Supra*). The plaintiff on the evidence is therefore entitled to judgment, the covenant being a collateral one, and not a condition precedent. We think, however, that this Court may regard the matter from an equitable light, and that it would be proper, as both parties have submitted to the arbitration, that if an award can be made within a reasonable time they should be bound by it. As the plaintiff's counsel have stated that they have no objection to this course, we suspend the entry of judgment in the plaintiff's favor for sixty days, within which time, if an award is made, its amount is to take the place of the verdict. Otherwise the jury's assessment is to stand. The motions for a new trial, and to enter judgment in the defendant's favor on the point reserved, are refused.

MCKENNAN, J., concurred.

DISTRICT COURT. MAY 3, 1878.

ADMIRALTY.

THE MARGARET *v.* THE CATHARINE WHITING.

1. A steamer seeing but one light of a sailing vessel until too late to avoid a collision. *Held,* under the evidence, to be in part responsible.

2. The failure of the sailing vessel to exhibit torch renders her also responsible.

LIBEL, for collision, by Pickering, master of the schooner Margaret, against the steamship Catharine Whiting.

STATEMENT.

Upon the night of November 2, 1877, the steamer Catharine Whiting was proceeding up the river Delaware in mid channel, nearly opposite Salem creek, under steam, at the rate of about six miles per hour, with proper lights and a good and sufficient lookout. The tide was about flood, and the wind blowing up the river.

The schooner Margaret, a small vessel, was beating down and tacking and at the moment of collision was heading S. S. W., and was struck on the port side and sank. She had proper lights, but did not exhibit a lighted torch upon the approach of the steamer.

The witnesses for the steamer testified that they saw nothing but the green light of the schooner until immediately before the collision, when both lights suddenly appeared. That the green light apeared upon their starboard bow and their wheel was then starboarded; that when both lights appeared, their wheel was put hard a-starboard and the engine reversed, but, the schooner being then under the steamer's bows, the collision was inevitable.

On the part of the schooner there was testimony that at the time of the collision, she was on her western or port tack. That the captain, his son, and the steward had gone below, but the captain had come on deck before the collision; that they had proper lights, red and green, and a man in the bow as a lookout. This man, however, was attending to the sails, and there was

evidence that he was not forward, and did not report the schooner to the man at the wheel. No one of the schooner saw the steamer until the two vessels were very close—twenty or thirty yards off—and then saw only the bright light and heard two whistles.

The captain of the schooner testified as to the course of his vessel, and that it was impossible that the steamer could not have seen the red light much sooner.

It was a rather stormy night, and the schooner made no effort to exhibit a lighted torch.

Coulston, for the schooner.

The direction of the wind compelled the schooner to tack as she did, and the steamer is in fault for not keeping out of the way.

It is impossible, in view of the course of the schooner, that the red light was not visible long enough before the collision to have prevented it had it been seen.

As to the torch, inasmuch as the failure to exhibit it did not contribute to the collision, the schooner was not guilty of contributory negligence.

The Tonawanda, ante p. 448.

Henry, for the respondent, steamer.

The testimony proves conclusively that the schooner did not exhibit a lighted torch, and is, therefore, in fault, and that the steamer had a good and sufficient lookout, and did not see the red light of the schooner until it was impossible to avoid the collision.

The schooner must, therefore, have cha ged her course when immediately in front of the steamer, and is, therefore, responsible.

The Wenona, 8 Blatchford, 507.

CADWALADER, J., held both vessels to be in fault, the schooner for not exhibiting a lighted torch, and the steamer for not seeing sooner the red light, its failure in that respect not being sufficiently explained.

Decree in favor of the schooner for half damages with costs.

DISTRICT COURT. OCTOBER 3, 1878.

ADMIRALTY.

THE SCHOONER MARIETTA TILTON *v.* THE STEAMER HARRISBURG.

1. In a plenary cause of collision, a witness was regularly examined for the libellants. He had been previously examined on oath in an investigation before the board of inspectors of steam vessels under the authority of an Act of Congress. The respondents could not use his deposition before the inspectors as evidence of what the witness stated in it, but could only use it for the purpose of contradicting him.

2. However the application of ordinary rules of evidence may be relaxed in a Court of Admiralty in proceedings which are summary and informal, there is no such relaxation in plenary causes.

3. When, upon analysis, the weight of the testimony points to the conclusion that the cause of collision was such an injudicious movement of one of the vessels as could not be foreseen or provided against by the other, such cause should be regarded, rather than the number of witnesses who may have testified to an opposite theory.

CAUSE OF COLLISION.

The facts will sufficiently appear in the opinion of the Court.

Henry Flanders and *Curtis Tilton,* for libellants.
Thomas Hart, Jr., and *J. W. Coulston,* for the respondents.

CADWALADER, J. The collision occurred in Vineyard Sound near to the Cross Rip Light Ship.

The case of the libellants, owners of the schooner, was that when the colliding vessels were about two miles apart, they were both approaching the light ship upon converging courses, the schooner from the westward, and the steamer from the eastward; that from this time the schooner showed her red light on the starboard bow of the steamer, and that, throughout this distance, both vessels held their courses, without deviation, till in the peril of collision, when the schooner ported, and the steamer improperly starboarded.

The case of the respondents, owners of the steamer, was that although the respective courses were more or less easterly, and more or less westerly, they were not converging courses, that,

on the contrary, each vessel showed her green light to the other vessel until just before the collision, when the schooner improperly changed her direction, attempting to cross the bow of the steamer, and thus caused the disaster.

What can have caused any danger of the collision which occurred is not easily conceivable. The night was very clear, the moon shining in her first quarter. It was not later than nine o'clock. Each vessel had the proper lights burning brightly. The deck of each was properly manned and officered. There was a sufficient lookout from each vessel; and each was actually sighted from the other at full distance. The light-ship, at her usual and known anchorage, was also in full view from each vessel. There was no extraordinary tide or wind—the actual wind being a full sail breeze for the schooner. The channel was broad. The narrowest part of it is where the light-ship lay, very near to the point of collision. Here the channel is three-quarters of a mile wide; and vessels pass in deep water, both inside and outside of the light-ship.

The seeming absence of danger may, perhaps, have caused inattention where it has not been detected. The sum of the velocities of the approaching vessels was such that if an injudicious act or omission occurred on the part of either of them, there may not have been sufficient time afterwards to avert the evil consequences. There is, however, no certainty on the subject.

The least improbable conjecture is, perhaps, that which may arise from the fact, that on board of the schooner, although it was the mate's watch, and he was thus nominally officer of the deck, her captain was also on deck directing some of her movements before and at the crisis of peril. To give such orders was not beyond the legitimate power of the captain. But his simple presence on deck and occasional giving of directions did not wholly exclude or supersede the duty or authority of the mate, whose watch it was; and it is not impossible that this may have caused some fatal misconception or confusion of orders.

It is not, however, necessary to consider the case upon any

such theory or hypothesis. The burden of proof is on the owners of the schooner, who are libellants, to show that the steamer was in fault. The question is, whether the libellants have relieved themselves of this burden.

Th course of the steamer was more or less westwardly, with a bearing towards the light-ship; and the course of the schooner more or less eastwardly, with a bearing which must sooner or later have been towards the light-ship. But independently of testimony which is irreconcilably conflicting, it is impossible to assume how far to the northward or southward of a line due east and west from the light-ship, either colliding vessel may have been at any point of time before the crisis of peril. Therefore the ingenious diagrams exhibited on the argument may define or elude the difficulties of the case, but cannot assist us in resolving them.

We know, with sufficient certainty, that when the colliding vessels, having sighted each other, were still perhaps two miles or further apart, their respective courses were such that the green light on the starboard bow of each vessel was shown to the other vessel. So long as this may have continued to be the case the vessels cannot have been upon converging courses, and there was no danger to be guarded against. We also know that the course of the steamer was maintained, without any change, until the crisis of peril. This was right, unless the schooner's direction had been so changed in the meantime that her port bow, with its red light, was shown to the steamer.

Just before collision, this red light of the schooner was discerned on board of the steamer. The wheel of the steamer was then immediately put to starboard. If the vessels had not been in very close proximity this would have been a wrong movement, because the steamer's helm should have been ported. But according to the preponderance of opinions of the nautical experts who have been examined, if the schooner's red light had not been previously shown, the putting of the steamer's wheel to starboard, at this crisis of peril, was not injudicious. If the question were doubtful, there would not have been any responsibility for an error of judgment at such a crisis.

The point to be decided therefore is whether the peril was caused by any *previous* fault of the steamer.

It is contended for the libellants that the schooner's course had, in point of fact, been previously so determined as to show her port light to the steamer. If such were indeed the case, the vessels must have been on converging courses before the crisis of immediate peril. In that case, the steamer was in fault for not porting her helm in season, to avoid the schooner.

The question of fact is thus whether the schooner's red light had been shown to the steamer before the crisis of peril?

Of the schooner's company two persons only survived the disaster. Of these two, one was not upon the deck, and cannot have known anything material. The other, a seaman named Carter, has been examined. He testifies that he was on the look-out, and reported the steamer's green light to the mate, when the captain came forward. The witness, after mentioning several orders given by the captain of the schooner, deposes that when about three-quarters of a mile from the light-ship, and about two miles from the steamer, the captain ordered the helmsman to keep for the light-ship, that the steamer then bore on the schooner's port-bow, and the light-ship was on the schooner's starboard bow, and that, from this time, there was no change in the course of the schooner until a minute before the collision. If this was the truth, it establishes the case of the libellants. But it is irreconcilably contradicted by the previous sworn statements of the witness himself.

The first of these statements was an affidavit procured and written by an agent of the respondents under such circumstances that no effect useful to the respondents ought to be attributed to it.

The second sworn statement was in an investigation before the local board of inspectors of steam vessels. This was a sworn examination, authorized by Act of Congress, and appears to have been conducted without any exercise of improper influence. In this examination Carter states that, in his judgment, the cause of the collision was "the undecided movements of the captain of the schooner, who was very nervous and excited;"

and says that, *when both vessels were showing their green lights,* the captain ordered the wheel of the schooner hard down (or a-port), and that, if this had been done, the collision would certainly have been avoided.

It is contended for the respondents, that they may use this former affidavit of Carter before the inspectors as evidence of what he states in it. The argument is founded on a supposed disregard in Courts of Admiralty of the ordinary judicial rules of evidence. The relaxation or inapplicability of such rules, which is to a limited extent allowable in summary causes, cannot, however, be extended to plenary causes. The present is a plenary cause. Therefore the only use which the respondents can make of the former affidavit is to contradict the judicial examination of Carter. This contradictory effect is so absolute as wholly to deprive the libellants of what might otherwise be the benefit of his testimony.

This is the less to be regretted, because there is another extra-judicial affidavit of Carter, which we have not seen. This was an *ex parte* sworn statement to the proctor of the libellants. It was, under a notice to produce it, called for at the hearing, but was not exhibited. The call gave to the libellants an opportunity to exhibit it if they thought it confirmatory of his judicial examination. The Court could not make an order which was asked to compel its production. But this does not prevent an unfavorable presumption from its non-production. Such a presumption would arise in any tribunal. But the reason for the presumption is peculiarly strong in a Court of Admiralty, where all persons on board of colliding vessels are witnesses of necessity, rather than witnesses for the respective parties adducing them for examination.

The result is that the libellants are without any support of their case from testimony of anyone who was on board of the schooner. The testimony of two persons who were on duty in the steamer is direct and explicit.

Budd, who was on the lookout, sighted the schooner and reported her to the mate, whose watch it was. The mate responded. The schooner was then on the starboard bow. Budd,

having reported her, was under no obligation of duty to keep her afterwards constantly in view. But there was nothing else in sight, and nothing to prevent him from doing so; and he testifies that he was watching her and her movements all the time. He certainly was in the most favorable position for discerning whatever was to be seen. He states that when she was within about three or four hundred feet off, and on the starboard bow of the steamer, she luffed, which brought her across the bow of the steamer, and caused the collision.

Murphy, the mate, is a more important witness. He saw the schooner's green light before Budd reported her. She was about two miles off, on the starboard bow of the steamer. Murphy says, "the schooner kept on showing me her green light after the man reported her, for three or four minutes, ... when she shut in her green light for a second or two. As she did this, I told the man at the wheel to starboard the wheel. In a second, just as he commenced to starboard his wheel, I told him steady, for she showed her green light all plain again. The schooner at this time was two and a half to three points on our starboard bow. *She kept showing her green light* until she came down about four points on our starboard bow. The schooner put his helm hard a-port, and showed its red light, shutting the green light in entirely. At this time she was between forty and fifty yards off." This was just before the collision. Murphy says further: "From the time I first saw the green light of the schooner up to the time she showed the red light, just before the collision, she was never less than two points on our starboard bow. She did not indicate at all that she was going to cross our bows until she showed her red light."

Recurring to the former part of his testimony, in which he had said that three or four minutes after the man at the wheel reported the schooner, she shut in her green light for a second or two, when the witness starboarded, and in a second steadied —he added, the vessel was then, "all clear of me on the starboard bow; she showed her green light again immediately. . . .When I starboarded and steadied, I could see the schooner;

she did nothing to concern me; she did not actually port. The shutting out of her green light for an instant may have been due to the wind or her sail. It was not due to porting at that time." Here it is important to observe that when the green light was thus shut out for an instant, she did not show her red light. If the red light had then been shown, it would have indicated such a changeableness, or uncertainty, in the course of the schooner as might have required the steamer to slow, or take some suitable precaution. But as the red light was not shown at all, and the green light was immediately again in full view, no change of direction was indicated, none can have occurred, and there was no occasion for any precautionary measure.

If Murphy tells the truth, the steamer was not in fault. His testimony is not of a negative kind. He does not merely say that he did not see the schooner's red light, but positively deposes that her green light was fully in view until the sudden change of her direction which caused the disaster.

The man at the wheel of the steamer, named Kelly, has also been examined. His testimony is not clear. Neither is it important. The man at the wheel owes no duty to look out. He does not leave his post, and is there only to receive and execute orders of the officer of the deck; and the man at the wheel of so large a vessel would not be in a position to see much if it were his duty to look out. When he receives and executes an order, there is nothing to fix it in his recollection unless it is immediately followed by some extraordinary effect. This man remembers the order to starboard given to him at the crisis of peril; and seems to have an obscure and confused recollection of the previous order to starboard which was instantly countermanded. There was an interval certainly of some minutes between the two orders to starboard; but the witness, from indistinctness of recollection, or from the form or inverted order of questions put to him, seems to express himself without any clear discrimination between the two orders. His testimony standing alone, might perhaps be understood as intimating that the course of the steamer had been changed when the prior order to starboard was given, which order as is explained

by Murphy, was instantly revoked, and never executed. All obscurity in this part of Kelly's testimony is however cleared up when we bear in mind that by the other evidence in the case, and by the pleadings and arguments on both sides, it is admitted, without question, that the steamer's course was not, in any wise, changed, until just before the collision, when the only starboarding, properly so called, occurred. The witness explicitly and repeatedly states that he does not remember seeing the red light of the schooner until she thus got "right close," and was apparently crossing the bow of the steamer; and he says that if the schooner had kept her previous course she would, to the best of his judgment "have gone all clear."

This witness says that when he first saw the schooner, he should judge that she was about two points on the starboard bow as near as he can remember. He says: "I could not tell how far off she was. I asked Mr. Murphy what is that fellow doing. I did not know exactly how the schooner was going, and that is the reason I asked Mr. Murphy. He looked through the glasses and made some remark that she was coming this way as near as I can remember." In another part of the testimony the witness says: When I first saw the schooner and noticed her course, I could not say how far she was off; she might have been three or four hundred feet; I starboarded at that time; I mean the time when I got the order. As near as I can remember it was after I starboarded that I saw the red light of the schooner. Mr. Murphy immediately took the glasses when I called his attention to the schooner. He immediately thereafter gave me the order to starboard."

It is not easy to analyze and apply this testimony. The libellants' counsel endeavors to apply it so as to impute negligence or inattention to Murphy. But I cannot see any sufficient reason for the imputation. The question put by Kelly was not one which required an answer from the officer on the deck. It was not necessary that the officer of the deck should be all the time using his glasses. The schooner and her light could be well discerned without them. But Murphy was actually using them at the time when the schooner's green light suddenly disap-

peared and reappeared; and there is no reason to doubt that he was using them constantly as was necessary. This he was doing independently of any suggestion from Kelly.

On a review of Kelly's testimony, I do not think that it materially assists or injures the case of either of the litigant parties.

A fireman named Butler, who was in the steamer, has been examined for the libellants. His duty was to work below at the coal bunker. He states that he was at work below when the vessel struck, but had not gone below until the schooner was distant four or five times her length from the steamer, and that he had continued to see her red light for ten minutes before he thus went below. It is highly improbable, if not incredible, that any man could thus have gone quietly below to his work, when within only four or five times the schooner's length from her, because a man the most unaccustomed to the water must then have seen that immediate collision was inevitable. But the witness, in cross-examination admits that he "had been back at work about three minutes before she struck." He afterwards says "three or four minutes;" but persists in the statement that she was only four or five lengths off and that for ten minutes he had been watching the schooner, seeing, not her green light, but "only the red light." He admits that he saw nothing while he was below. Butler's testimony, however qualified, would, if true, decide the case in favor of the libellants. He is contradicted by another fireman named Duffy. But whether contradicted or not, the testimony of Butler is of little weight. Those who are in the habit of considering the testimony of persons on shipboard, even that of persons of the nautical profession, rely very little upon impressions on the memory of witnesses who were not performing any duty connected with the subject of their evidence. Listlessness and inattention when off duty are frequent, if not habitual; and this man, if he was observing the schooner at all, was more or less neglecting his own duty. It would be quite unsafe to rely upon such evidence in opposition to that of the officer of the deck.

Therefore the case of the libellants would fail if it depended upon testimony of persons in the colliding vessels.

The light-ship was at her anchorage, close to the point of collision. She was "lying head to the westward, stemming the tide." If we knew with sufficient certainty, the respective bearings upon her of the approaching steamer and schooner, we might determine at about what distance their courses first became converging. It was not the duty of anyone in the light-ship to observe such courses or bearings of passing vessels. But there was nothing to prevent such observation, and there might occasionally be strong reasons to induce it. Two persons who were in the light-ship have been examined. One of them, a seaman named Barnard, testifies in a very imposing manner. But when his testimony is carefully considered, he appears to have hastily conceived crude impressions, and to have relied on them afterwards with overstrained confidence. Thus, for example, he undertook to say that from his position in the light-ship he could see on board of the steamer, and that he could see no lookout on her deck. This he said so as to imply a statement or a belief on his part that there *was* no lookout from the steamer. Now he cannot have had any sufficient knowledge on the subject, and the testimony of those on board of the steamer establishes most conclusively that Budd was, from first to last, on the lookout, and remained upon the forecastle deck until he jumped down at the instant of the collision. I mention the fact here with a sole reference to the credit attributable to impressions on Barnard's mind.

In another part of his testimony, being asked what enabled him to give the bearings accurately of both the steamer and the schooner when he first saw them, and whether he looked at his compass, or made any particular observations at the time, he answered "yes;" and, being asked what induced him to look at that time, and whether doing so was any part of his business, he answered, that sometimes he went and looked at the compass to see how vessels were bearing when they were coming down, and that he took particular notice how this schooner was bearing from the light-ship before the steamer struck her. Here he does not mean to affirm that he took the bearing of either approaching vessel (not even that of the schooner) by the com-

pass, nor was it contended in argument that he did so, and yet his language almost implied an assertion that he made either some observation by the compass, or some observation of not less precise accuracy.

This having been premised, we may consider his testimony. He was on the deck of the light-ship, and saw each of the approaching vessels. He says that when he first observed the steamer she was about a mile and a half off, and was bearing east from the light-ship, and that when he first observed the schooner she was about half a mile off, and bore from the light-ship about northwest by west, and that he saw no subsequent change in the course of either vessel until the collision. If all these impressions on the mind of the witness were, in every respect, precisely correct, the vessels must have been on such converging courses that the schooner's red light very soon became discernible from the steamer. In that case, the steamer ought to have ported her helm instead of continuing her course. According to the libellants' theory of the case the steamer was thus in fault. To this theory as applied through Barnard's testimony, the libellants' diagrams mentioned in a former part of this opinion are adapted.

But the theory, so far as thus dependent upon Barnard's testimony, is refuted in a great measure, if not altogether, by that of the other witness, named Plaskett, the captain of the light-ship. Captain Plaskett was not on the deck of the light-ship at the moment of the collision. But he had been on her deck less than, or not more than, five minutes before it; and he did not go below until after he had seen the lights of both of the approaching vessels; and he testified that there was nothing in what he saw to lead him to expect a collision between them. An important part of his testimony with an intended application to Barnard's, is that vessels approaching at some distance eastward or westward of the light-ship, might change their courses "a point or two without altering their lights"; and he added that a seaman of experience could, with observation, tell from the light, the course of vessels *within two points.* In other words there would be no certainty, within twenty-two and a

half degrees, in such impressions of the most accurate observer. This uncertainty may be considered greater as to Barnard, who was not a cautious observer, but conceived opinions hastily. It must be remembered also that both Barnard and Captain Plaskett were speaking of bearings from the light-ship, and not of the bearing of the schooner from the more distant steamer. Similar considerations are more or less applicable to the course of the steamer, which may likewise have been mistaken a point or two. This increases the uncertainty, and, in effect, doubles the measure of uncertainty.

Here it perhaps becomes important to observe moreover that Captain Plaskett says he saw the green light of the schooner, and does not mention her red light at all; but Barnard says "the schooner headed southeast when I first saw her. I saw both her lights until she got almost to us," and says that she then shut in her red light. This was almost at the instant before collision. Upon a comparison of these parts of the testimony of the two witnesses, we may conceive the probability, or possibility, that the red light of the schooner may not have been exhibited to the light-ship until after Captain Plaskett went below. If such was the case, the red light probably was not discernible from the steamer, which was farther off, until somewhat later.

The last suggestions are not purely conjectural. They acquire force when we recur to the other testimony, which is inconsistent with the schooner having been, when Barnard first saw her, so far to the northward of the course of the steamer that the vessels were moving on converging lines.

We do not know, with sufficient certainty, where the schooner was at any time. The course of the steamer, though perhaps less uncertain, cannot be determined with geometrical precision.

The case of the libellants, founded upon the testimony of Barnard and Butler, has been presented very plausibly and argued very forcibly. But the arguments have not convinced me that I ought to disregard the testimony of Murphy, the mate of the steamer, whose means of knowledge were the best. We should weigh testimony rather than count witnesses.

The libel must therefore be dismissed, and, I regret to say with costs. But it is hoped that payment of them will not be exacted, as the case is one of extreme hardship.

An appeal to the Circuit Court was taken in this case and afterwards dismissed.

DISTRICT COURT. OCTOBER 5, 1878.

ADMIRALTY.

THE BARQUE HAUGESUND *v.* THE SCHOONER BOWDOIN AND THE TUG CYNTHIA.

A change of course by a vessel by reason of which a collision is occasioned is not necessarily negligence, but may be justified by nautical experience as a nautical necessity which should have been foreseen and provided against by the other vessel.

LIBEL in a cause of collision.

STATEMENT.

The "Haugesund" was a Norwegian vessel, which having taken on board a full cargo of rye at a wharf on the Schuylkill river was towed by the steam tug Cynthia into the Delaware for safe anchorage. The tug was lashed to the starboard side of the barque, and they were on the Western side of the channel abreast of League Island when the collision occurred. The schooner came down the river bound from Philadelphia to Portland with a cargo of coal. She had run out a full tack to the west shore and had gone as far as she could toward the shore when she tacked and came about to the eastward, holding a steady course. No change was made in the course of the tug and it became apparent that a collision was inevitable. The master of the schooner then caused her to "luff up," which, without averting the collision dimished the effect of it.

It seems that the inclination of the Court was, in the first instance, to consider the change of "tack" by the schooner unwarranted. But the assessors to whom the cause was referred justified the movement as a nautical necessity which the tug

was bound to foresee and provide against, and the Court adopted their opinion. The tug which admittedly controlled the action of the barque, was alone condemned.

Mr. Driver and *Mr. Coulston,* for the libellant. *Mr. Wilson* and *Mr. Johnson,* for the Cynthia, and *Mr. Roney,* for the Bowdoin.

CADWALADER, J.

The report of the assessors was presented in the spring of 1877. Further evidence was afterwards adduced, and in November, 1877, the case was reargued. The decision has been deferred, because it was supposed that in another case, or cases, before the Circuit Court, a question somewhat similar might be considered.

It is not easy for a landsman like myself, or even perhaps for a mariner of limited experience, to conceive rightly the nautical relations between a tacking vessel and one sailing with the wind or propelled by steam, and especially one propelled by steam. The difficulty arises from a tendency to assume that the tacking vessel may change her tack without the danger of missing stays or of some other retardment such for example as occurred in the present case. But there is almost always more or less of such danger. Therefore it is in the opinion of men of nautical experience always the duty of a steamer to avoid getting into such proximity to a tacking vessel that a change of her tack might cause a possibility of danger. They concur in attributing to the tacking vessel an almost unlimited discretion to change her tack in many cases in which a landsman might suppose that relations of other vessels would require the tack to be prolonged.

I always find difficulty in understanding or applying the rules of decision which are proper in such cases.

In the present case the schooner was on a tack; and the assessors are of opinion that she had, with relation to the tug, a right to change the tack.

For this opinion they give an unanswerable reason. It is that had she prolonged her former course extending it inside of the

buoy, and then attempted to tack, she must, if she had missed stays, have gone ashore. This opinion of the assessors does not depend upon any question of the depth of water at the buoy or inside of it, but on the nearness of the shoals on which she would, or might have been wrecked if she had missed stays. The language of the assessors must, in this respect, be understood with reference to variable depths and to the shoals inside of the buoy. When she tacked, it happened that although her head sheets were lighted up so as to enable her to luff, she did not luff. There had been a possibility that this might happen. The tug being in too close proximity the collision ensued. For this proximity the tug alone was in fault.

One of the assessors thinks that the schooner was remiss in certain particulars which he mentions. But this, if so, would not prevent the tug from being primarily liable for the whole damage suffered by the barque which she had in tow. The case would not be a proper one for dividing the damages. If the owners of the barque should fail to obtain satisfaction from the tug, they might possibly under the present libel have an ulterior recourse against the schooner. But no such question arises practically.

The decree must be against the tug for such damage as shall be ascertained to have been suffered by the barque.

DISTRICT COURT. NOVEMBER 23, 1878.

ADMIRALTY.

SCHMIDT *v.* THE STEAMSHIP PENNSYLVANIA.

A shipper of goods has no right to stop them, after a sale by his vendee to a third party; and the master's refusal to deliver to such subsequent vendee, though under the vendor's orders, is at the master's peril, and if loss occur (*e. g.*, by reason of a falling market) he is responsible to such vendee.

THIS was a libel filed by Schmidt, the holder of a bill of lading for goat skins, which on arrival of the vessel, the steamship Pennsylvania, at Philadelphia, he presented to the ship's

agent, and delivery of which was refused pursuant to a cable telegram from the shippers.

The goods originally were shipped by one Bresch, at Trieste, on a through bill of lading, via Liverpool, signed by the respondent's agent at Trieste; the goods came into the respondent's possession, and were forwarded by them from Liverpool. The bill of lading was made out in the name of Bresch as shipper, deliverable to his order. Bresch endorsed the through bill of lading to Havemann & Poleman at Paris, from whom Schmidt obtained the same, by endorsement for value. Before the arrival of the vessel at Philadelphia, Bresch's agent at Liverpool telegraphed the agents of the Pennsylvania to stop delivery of the goods as against the holder of the bill of lading. The vessel arrived at Philadelphia February 3, 1878, and commenced discharging cargo on the 7th. The libel was filed on the 12th of February, 1878, claiming the value of the goods. On February 19, 1878 (before the time for filing an answer had expired), the order to stop was withdrawn, and on the same day, the vessel's agent notified Schmidt of the fact that they were prepared to deliver the skins. Schmidt refused to accept the same unless paid the sum of $1,090.51 for the damages which he had sustained by loss of a sale to one Keene. Subsequently under an order of Court, the skins were delivered to Schmidt, he reserving his right to claim damages, for any loss which he had sustained by the refusal to deliver on arrival.

The evidence as to the sale of the goods to Keene consisted of an order for the importation of these skins, accepted by Keene from Schmidt, dated at Philadelphia. This order stipulated that Keene should advance part of the price in two notes for $800 each, Keene to pay insurance and banker's commission, the goods to be shipped in December. Havemann & Poleman at Paris had secured the goods in Trieste of Bresch for December shipment, and notified Schmidt of the price at which they had secured them, offering them at a smaller advance to Schmidt who accepted, and placed them with Keene, Havemann & Poleman allowing Schmidt a commission in the transaction. The goods were shipped from Trieste in December.

The answer of the steamship company set forth the facts in relation to the shipment, the notice by the shipper to stop in transit, and the subsequent withdrawal of the order, and the offer to deliver to Schmidt; and further averred as follows: "and that in acting in accordance with the same, the respondents fulfilled their duties as carriers under the engagement with the shipper contained in the bill of lading, and that no liability exists on the part of the respondents for any loss which the libellant may have sustained by reason of the exercise by the vendor of the right of stoppage while in their hands as carriers."

E. G. Platt and *S. Dickson,* for Schmidt, libellant.

The whole transaction as disclosed by the correspondence and testimony shows that Schmidt became the purchaser of these skins from Havemann & Poleman, and subsequently sold them to Keene. He had paid for the goods, and was therefore a bona fide holder for value of this bill of lading. That being so, the right of stoppage in transitu did not exist. This has been settled ever since the leading case of Lickbarrow *v.* Mason. If the owner of a vessel under such circumstances takes upon himself the responsibility of refusing delivery of the goods, he does it at his peril. He runs the risk of the title of the holder being good as against the shipper, and in that case he is liable to him.

Abbott on Shipping, 337, 338.

The only safe course when the bill of lading is outstanding in the hands of a third party is to demand indemnity from the shipper when he gives notice and attempts to exercise the right of stoppage in transitu.

(CADWALADER, J. Is an instrument like the one in question a regular bill of lading, and will a transferee for value be invested with the rights of a bona fide holder for value of a regular bill of lading? This paper was issued in Trieste, and is signed by the agent of the steamship company. Bills of lading are signed by the master of the vessel.)

This is what is known as a *through* bill of lading. It may be true that a sailing vessel's bills of lading should be signed by the master. This is a steamship company, and the validity of these through bills of lading has become a well recognized fact in the commercial world. By them, goods are shipped from California to Russia, from China via United States to Europe, in fact from almost any one part of the globe to another. The distinction between the two classes is well settled.

Schmidt, then, being the holder of the bill of lading, was entitled to the possession of the goods on arrival. On account of his inability to obtain possession, he lost the opportunity of carrying out the sale to Keene, and they were thrown back on his hands. The measure of damages, therefore, is the difference between what Keene would have paid him and what the goods were worth when actually delivered to him. This was not until March 4, 1878. The loss is, therefore, as appears by the testimony, about $2,000.

(CADWALADER, J. I think that the market value at the time the respondents offered to return them should be taken as of February 9, 1878.)

No, because they refused at that time to give them up unless we should waive all claims to damages. There was really no absolute offer to give them up until the time when the order of the Court was made, viz., March 4. We insist that that time, therefore, is to be taken for fixing the value of the skins.

M. P. Henry, for the steamship, contended that Schmidt acted only as agent for Keene, and that there was no loss of any sale by Schmidt as the goods were Keene's. The libel should have been brought by Keene.

As to the liability of the ship for obeying the order of the shipper. The master is not bound to decide whether the right to stop has been lost by endorsement of the bill of lading for value or otherwise.

The Tigress (Brown & Lushington, 44) denied the right of the master to demand evidence that the vendee had not parted

with the bill of lading. The master had a right to compel Bresch and Schmidt to interplead, and they would have applied to the Court to take the goods in their custody, and determine the right of the respective parties to them.

Abbott on Shipping, 540.
2. Story's Equity Jurisprudence, § 518.
3. Maddox's Chancery, title "Interpleader."

This course was prevented by Bresch, the shipper, withdrawing the stoppage. It is the case of the holder of a fund claimed by two persons. The bailment of a transporter does not impose on the master the duty of determining whether the right of stoppage has been lost by the shipper. The master is the shipper's agent, and must obey his orders. Right of stoppage is not necessarily lost by endorsement to order.

Feise *v.* Wray, 3 East, 93.
Thompson *v.* Frail, 6 Barn. & Cress. 36.
Litt *v.* Cowley, 7 Taunton, 169.

If the master had undertaken to return the goods to the shipper, he would have incurred responsibility to the holder of the bill of lading, and *vice versa,* but, while he held subject to the conflicting claims, he is not responsible.

CADWALADER, J.

The detention of the skins by the defendants was wrongful. There could be no rightful stoppage in transitu by reason of the former owner's insolvency. Through this wrongful detention and the consequent inability to deliver the goods to the purchaser in Philadelphia, the benefit of the sale to him was lost. He rejected the goods as he had a right to do, and the market had fallen so that a loss which is the measure of damages had been suffered.

Decree accordingly.

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ADMIRALTY.

THE SCHOONER CLARA DAVIDSON.

A decree rendered against a stipulator after his death, although in ignorance of that fact, is void and will be set aside on motion.

LIBEL for collision filed by McCoy and others, owners of the schooner *Eliza Ann,* against the schooner *Clara Davidson.*

The master of the latter vessel appeared and made a claim with one Edwards as stipulator. The suit proceeded, and a decree for half damages was made against the claimant and stipulator, in 1876. Edwards had died before the decree, but the fact was unknown to libellant, had never been suggested of record and no substitution was made.

E. B. Watson, for the administrator moved to vacate the decree.

J. W. Coulston, contra.

CADWALADER, J., holding the decree against the surety void by reason of his previous death, ordered it vacated.

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